166-485

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~911~~. ~~222~~ 222

HERMAN ZADIG, JOSEPH WOLLBERG, AND JOSEPH MARKS, COPARTNERS UNDER THE FIRM NAME OF ZADIG, WOLLBERG & COMPANY, PLAINTIFFS IN ERROR,

vs.

IDA B. BALDWIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 12, 1895.

(15,788.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 904.

HERMAN ZADIG, JOSEPH WOLLBERG, AND JOSEPH MARKS, COPARTNERS UNDER THE FIRM NAME OF ZADIG, WOLLBERG & COMPANY, PLAINTIFFS IN ERROR,

vs.

IDA B. BALDWIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1895.

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1 Original.

No. 15652.

In the Supreme Court of the State of California.

IDA B. BALDWIN, Plaintiff and Respondent,
vs.
HERMAN ZADIG *et al.*, Copartners under the Firm Name of Zadig, Wollberg & Co., Defendants and Appellants.

Transcript on Appeal from Superior Court, City and County of San Francisco.

Edmund Tauszky, attorney for defendants and appellants.
T. C. Van Ness, attorney for plaintiff and respondent.

Filed this 24th day of February, 1894.

L. H. BROWN, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

2 In the Supreme Court of the State of California.

IDA B. BALDWIN, Plaintiff and Respondent,
vs.
HERMAN ZADIG, JOSEPH WOLLBERG, and JOSEPH MARKS, Copartners under the Firm Name of Zadig, Wollberg & Company, Defendants and Appellants.

Transcript on Appeal from Judgment of Superior Court of San Francisco in Favor of Plaintiff, and from Order of said Court Denying Motion of Defendants for a New Trial.

Edmund Tauszky, attorney for defendants and appellants.
T. C. Van Ness, attorney for plaintiff and respondent.

3 *Complaint.*

In the Superior Court of the State of California in and for the City and County of San Francisco.

I. B. BALDWIN, Plaintiff,
vs.
HERMAN ZADIG, JOSEPH WOLLBERG, and JOSEPH MARKS, Copartners under the Firm Name of Zadig, Wollberg & Company, Defendants.

Plaintiff above named complains of defendants above named, and for cause of action alleges—

1. That defendants are and at all the times herein mentioned have been copartners, doing business under the firm name and style of Zadig, Wollberg & Company.

2. That defendants are indebted to plaintiff in the sum of five hundred and ninety-five (595) dollars, money had and received by defendants to and for the use and benefit of plaintiff within two years last past, no part of which has ever been paid.

Wherefore plaintiff prays judgment against defendants for the sum of five hundred and ninety-five (595) dollars, with interest and costs of suit.

T. C. VAN NESS,
Attorney for Plaintiff.

Duly verified by plaintiff before Holland Smith, a notary public, on Dec. 31st, 1892.

Endorsed: No. 39362. Dep't No. 1. Garber, presiding judge. Filed Dec. 31, 1892. Wm. J. Blattner, clerk, by H. F. Morris, deputy clerk.

4 *Demurrer to Complaint.*

(Title of Court and Cause.)

The defendants in the above-entitled action hereby demur to plaintiff's complaint therein upon the ground that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray to be hence dismissed with their costs.

EDMUND TAUSZKY,
Att'y for Df'ts.

Endorsed: Due service of within demurrer admitted this 12th day of January, 1893. T. C. Van Ness, attorney for plaintiff. Filed Jan'y 12, 1893. M. C. Haley, clerk, by W. T. Haveley, deputy clerk.

Order Overruling Demurrer.

(Title of Court and Cause.)

In open court, Jan. 20, A. D. 1893.

In this action the demurrer of the defendants to the plaintiff's complaint came on regularly to be heard this day, and on motion of T. C. Van Ness, Esq., counsel for plaintiff, it is ordered that said demurrer be, and the same is hereby overruled, and the defendants allowed ten days in which to answer.

Minute Book 11, dep't 1, p. 285.

Answer.

(Title of Court and Cause.)

The defendants in the above-entitled action hereby make answer to plaintiff's complaint therein, and for answer thereto, they deny, and each of them denies, that they are, or that any of them is, in-

debted to plaintiff in the sum of $595 or in any sum or dol-
5 lars, money had and received, or money had or received by them or any of them, to and for, or to or for the use and benefit, or use or benefit, of plaintiff within two years last past, or within any time last past, or otherwise, or at all.

Wherefore, defendants pray to be hence dismissed with their costs.

EDMUND TAUSZKY,
Attorney for Defendants.

Duly verified by defendant Zadig, before Geo. T. Knox, a notary public, on March 6th, 1893.

Endorsed: Due service of within answer admitted this 7th day of March, 1893. T. C. Van Ness, attorney for plaintiff. Filed Mar. 7, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

Findings and Decision.

(Title of Court and Cause.)

The above-entitled action came on regularly for trial before the court, sitting without a jury, a trial by jury having been by the parties theretofore expressly waived, T. C. Van Ness appearing for the plaintiff, and Edmund Tauszky for the defendants; whereupon evidence was taken and the case argued and submitted upon behalf of the respective parties; and now, the court having heard and considered the evidence and the law, and being fully advised in the premises, finds the facts to be:

1. That at all the times mentioned in the complaint defendants were copartners, doing business under the firm name and style of Zadig, Wollberg & Company, and during all of said times were engaged in business as stock brokers, and at all of such times,
6 as such brokers, bought and sold shares of the capital stock of mining corporations for persons requesting them so to do, upon payment of the brokerage commission by them charged. In purchasing shares of stock for persons so requesting them to do, as above stated, the defendants would charge to the account of the person, or persons, for whom said stock was so purchased the cost price thereof, and would credit the said person, or persons, with such amount as would be paid in to said defendants upon account of said purchase, and when said amount so paid in was less than the said cost price of said stock, would carry the said stock for the person, or persons, for whom it was purchased, charging unto said person, or persons, interest upon the difference between the cost price of said stock and the amount or amounts so deposited. In carrying shares of stock for persons for whom purchased it was customary with defendants, to protect themselves against a decline in the value of said stock, to demand and receive from said persons for whom the same was purchased, upon a decline in the value of said stock from the price at which purchased, an additional deposit, which, when added to deposits previously made, would leave a

margin of value in said shares of stock in excess of the amount or amounts deposited, which would protect the said defendants from loss by reason of the decline in the value of said shares, and in case said additional deposit when so called for was not made, to sell said shares of stock so carried for such persons, and credit the account of said persons with the amount realized upon such sale, less brokerage commission thereon.

2. That between March 3d, 1892, and December 12th, 1892, the plaintiff deposited with the defendants, in United States gold coin, the sum of five hundred and ninety (590) dollars, whereupon,
7 and at different times during said period, the defendants, pursuant to their custom as in finding one stated, purchased for plaintiff shares of the capital stock of certain mining corporations organized and existing under the laws of the State of California, charging against the account of plaintiff, the purchase price of said shares, a brokerage commission upon the amount of purchase, and interest upon the debit balances of plaintiff, and a brokerage commission upon the sales price of said shares when and as sold.

3. That upon each purchase of shares of stock by defendants for plaintiff, as in finding two stated, the defendants received from plaintiff a written order for said purchase, signed by plaintiff, which said written order was upon a printed blank prepared by defendants, and was in the words and figures following, to wit:

"Zadig, Wollberg & Co.

Terms and Conditions upon which We Do Business. Read Them.

We will act as agents and brokers in the purchase and sale, for cash only, of stocks and bonds for our principals, in all cases making or accepting full cash payment only, on purchases and sales, and will charge a commission for our services; we will loan money on stocks and bonds, charging interest at the rate of one and one-half per cent. per month, compounding monthly, on any money so loaned. All such loans will be made with the distinct understanding that all bonds and stocks upon which we make them, or upon which we advance money to pay assessments, are, and shall be and remain, the property of our principal, or of the person to whom any loan or advance is made thereon, subject only to our interest therein as pledgees, as hereinbelow specified; all stocks and bonds upon which loans or advances are made by us for any purpose,
8 shall be deposited by the owner thereof with us, or delivered to us on his behalf, and held by us in pledge and as collateral security for the payment of any and all moneys loaned or advanced by us thereon, and of any and all commissions and interest due or to become due to us, and of any and all moneys owing to us by the owner, for any cause, at any time while we hold the same; and the proceeds of all sales of stocks or bonds of such owner shall be applied to the payment of such loans and advances, commissions, and interest at the rate of one and one-half per cent. per month; interest at said rate shall be payable monthly upon any balance or sum then due us; any and all stocks and bonds, or any

part thereof, deposited with us in pledge, may be sold to pay such indebtedness, or any part thereof, at any time, at our option and discretion, at private sale or in the San Francisco stock and exchange board, or elsewhere, without notice of any kind of the time or place of sale, and without any notice whatever, and without any demand for the payment of such indebtedness, or any part thereof, and without any demand whatever, whenever such collateral security is deemed insufficient by us; and we shall be at all times the sole judges of the sufficiency of the security; demand of payment, and notice of the time and place of sale, shall be deemed waived in all cases; we shall not be obliged or required to keep on hand the identical bonds or certificates of stock purchased or pledged, but it shall meet all obligations and requirements on our part, if we shall have the same number of the same bonds, or the same number of shares of the same stock, to surrender to the owner when redeemable or properly deliverable, and properly demanded; we engage and agree to hold ourselves in readiness, and to be able at all times, to deliver to any and all owners, all stocks and bonds purchased by us as agents and brokers, or deposited with us as collateral security, upon payment to us of the amount of the indebtedness thereby secured, or due thereon. All money owing to us shall be payable in U. S. gold coin. These conditions shall not be varied by any oral agreement, and shall form part of all transactions, whether such transactions, or the orders for the purchase or sale of stocks, are oral or in writing.

SAN FRANCISCO, CAL., ——, 189–.

Messrs. Zadig, Wollberg & Co.: Subject to all the above terms and conditions, which I have read, and to which I hereby agree, I hereby appoint you my agents and brokers, for the purchase and sale of stocks and bonds, for me, and on my account, and at my risk and expense, as per my orders, whether oral or written, and hereby authorize you to sell any and all stocks and bonds held by you as collateral security, in the manner, and under the circumstances and conditions above specified, to pay any indebtedness, or any part thereof, which may be due from me to you.

It is expressly understood that you shall not share in any profits or losses arising from purchases or sales of stocks or bonds, made by you on my account, and that you shall have no interest in any such stocks or bonds, other than as pledgees.

In consideration of loans and advances heretofore made and hereafter to be made by you, to me, at my request, and in further consideration of the terms of your agreement above set forth, and of your acceptance of this appointment and order, I hereby expressly release and forever discharge you, of and from any and all causes and rights of action, claims and demands, of every kind and nature heretofore or now existing in my favor against you, or any of you, on account of any and all transactions of any kind or nature, in stocks or bonds on my account, or for the recovery of any money heretofore, or now deposited by me with you or paid by me to you, for the purchase of stocks or bonds, or for any other

purpose, and in consideration of the foregoing matters, I further hereby expressly ratify and confirm all past transactions between us, respecting the purchase and sale of stocks or bonds, on my account, and all deposits and payments of money heretofore made by me to you, or by you on my account, and in consideration of said matters, I further hereby undertake and agree to indemnify you against, and to hold you absolutely harmless from, all losses and liabilities of any kind or nature, on account of any and all past, present and future transactions between us, in respect to the purchase or sale of stocks or bonds, which have been, are, or may hereafter be authorized by me, either orally or in writing.

Subject to all of the foregoing terms and conditions, I hereby authorize and request you, as my agents and brokers, for me, as your principal, and for my account and risk, and at my expense, to

. . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . ."

Upon giving said order the blank thereon for the date of said order would be filled in and the name and number of shares and signature of the plaintiff written thereon.

4. That at all of the times in the complaint mentioned the gross purchase price of the shares of stock purchased by defendants upon and for the account of plaintiff, as in finding three stated, was in excess of the gross amount, or amounts, deposited by plaintiff with defendants on account of said purchase, and during all of
11 said times the defendants retained and held possession of the said shares of stock so purchased for plaintiff, as security for the repayment to defendants of the excess of the purchase price of said stocks, brokerage commissions thereon, and interest upon debit balances, and, from time to time, called upon, demanded and received from plaintiff additional deposits of money to make good such, or any, margin between the then and current market value of said shares of stock so held for plaintiff, and the amount or amounts so, as aforesaid, deposited by plaintiff as would give to defendants the margin of security by them in their business demanded and required; whereupon, and in accordance with said demands, plaintiff did, from time to time, make such additional deposits, until on or about December 13th, 1892, when, upon demand for an additional deposit, as aforesaid, plaintiff failing to make the same, such shares as were then and there held by defendants for plaintiff as security, as aforesaid, were by the defendants, without the consent of plaintiff, sold and disposed of.

5. That the deposits of money by plaintiff with defendants and the purchases and sales of shares of stock by defendants for and on account of plaintiff, and the charges of defendants against plaintiff for and on account of commissions and interest, as stated in findings 2, 3 and 4, were as follows:

12

1892.		Dr.	
M'ch	4.	25 C. C. & Va., 4.20	105 00
		Com	1 00
		25 do. 4½	112 50
		Com	1 00
	22.	"	1 25
	24.	50 Chollar, 1.35	67 50
		50 Con. Cal. & Va., 5¼	262 50
		Com	2 30
	31.	Int.	1 05
Apr.	6.	100 C. C. & Va., 5	500 00
		Com	2 50
	30.	"	5 65
May	31.	Int.	6 35
June	2.	Ass't 50 Chollar	25 00
	30.	Int.	6 05
	31.	"	6 30
Aug.	31.	"	5 60
Sept.	30.	Int.	5 50
Oct.	31.	"	5 70
Nov.	30.	"	4 95
Dec.	14.	Com	1 35
			$1,129 05

		Cr.		
M'ch	3.	Cash	50	
	4.	"	50	
	11.	"	60	
	22.	50 C. C. & Va., 4.90	245	
	23.	Cash	50	
Apr.	9.	"	150	
	14.	"	50	
May	18.	"	40	
July	30.	"	50	
Oct.	24.	"	50	
Dec.	12.	"	40	
	14.	150 C. C. & Va., 1.80	270	
				$1,105 00
		Balance		$24 05

13 6. That prior to the commencement of this action plaintiff demanded of defendants the return to plaintiff of all moneys deposited with defendants, as in findings 4 and 5 stated, but to return the same or any part thereof defendants refused.

As conclusions of law from the foregoing facts the court finds that plaintiff is entitled to judgment against the defendants for $590, with interest thereon as follows, to wit: On $50 from March 3, 1892; on $50 from March 14, 1892; on $60 from March 11, 1892; on $50 from

March 23, 1892; on $150 from April 9, 1892; on $50 from April 14, 1892; on $40 from June 18, 1892; on $50 from July 30, 1892; on $50 from October 24, 1892, and on $40 from December 12, 1892, and for costs of suit.

Wherefore it is ordered that judgment be entered for plaintiff for $590, interest as aforesaid, and costs of suit.

EUGENE R. GARBER, *Judge.*

San Francisco, August 11th, 1893.

(Endorsed:) Filed Aug. 11, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

Judgment.

(Title of Court and Cause.)

AUGUST 11TH, 1893.

This cause came on regularly for trial, T. C. Van Ness, Esq., appearing as counsel for the plaintiff and Edmund Tauszky, Esq., for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury: Whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined and certain documentary evidence was introduced; the evidence being
14 closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law, and the finding aforesaid, it is ordered, adjudged and decreed, that Ida B. Baldwin, plaintiff, have and recover from Herman Zadig, Joseph Wollberg and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, defendants, the sum of six hundred and forty-two $\frac{26}{100}$ ($642.26) dollars with interest thereon at the rate of seven per cent. per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $47.50.

Judgment recorded Aug. 16th, 1893, B. 20, p. 187.

Notice of Intention to Move for a New Trial.

(Title of Court and Cause.)

To the plaintiff in the above-entitled action, and to T. C. Van Ness, Esq., her attorney:

Please take notice that the defendants in said action intend to move and make application to the above-named hon. court to vacate and set aside its findings and decision, heretofore, to wit: on the 11th day of August, 1893, rendered and filed herein, and the judgment heretofore, to wit: on the 16th day of August, 1893, entered herein, and to grant a new trial of said action.

Said motion and application will be made upon the following

grounds, and for the following causes, materially affecting the substantial rights of said defendants:

First. Insufficiency of the evidence to justify the said findings, decision and judgment.

15 Second. That said findings, decision and judgment were and are against law.

Third. Errors in law occurring at the trial of said action, and excepted to by said defendants.

Said motion and application will be made upon this notice, and upon a bill of exceptions and statement of the case.

Yours, etc., EDMUND TAUSZKY,
Attorney for Defendants.

San Francisco, August 21, 1893.

(Endorsed:) Due service of within notice is hereby admitted this 21st day of August, 1893. T. C. Van Ness, att'y for pl'ff. Filed Aug. 21, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

Bill of Exceptions and Statement of the Case upon Motion of Defendants for a New Trial.

(Title of Court and Cause.)

Be it remembered, that this action was commenced by the filing of a complaint on the 31st day of December, 1892; that thereafter, to wit: on the 7th day of March, 1893, defendants duly served and filed their answer herein; that thereafter, to wit: on the 29th day of March, 1893, a trial by jury was expressly waived by the several parties and their respective attorneys, by written consent, filed with the clerk of the court on said last-named day; and that thereafter, on the 24th day of April, 1893, said action came on duly and regularly for trial by the court, sitting without a jury, upon the issues made by the complaint of plaintiff, and the answer of defendants thereto and said action was accordingly tried by the court without a jury, upon said issues, on said last-named day.

16 T. C. Van Ness, Esq., appeared on behalf of plaintiff and Edmund Tauszky, Esq., on behalf of defendants.

Plaintiff's counsel made an opening statement to the court, and thereupon the following proceedings were had:

ALBERT S. WOLLBERG was called as a witness on behalf of plaintiff, and was duly sworn, and testified as follows:

My name is Albert S. Wollberg. I am a nephew of Joseph Wollberg, one of the defendants in this action.

My uncle is in Europe, and I represent him in the firm of Zadig, Wollberg & Co.; this firm is composed of Hermann Zadig, Joseph Marks and Joseph Wollberg, the defendants in this action; the office of the firm is at 306 Montgomery St., in this city and county, and the firm carries on the business of stock brokers under the above firm name; the firm buys and sells stocks on commission; the defendant Joseph Marks is a member of the San Francisco stock and exchange board; I am familiar with the accounts and business of

the firm; I am in charge of the office, and superintend it generally, and have been so since my uncle left for Europe, in December, 1891.

I have seen plaintiff in the office of the firm; she had an account with the firm. (Pass book labeled on the outside "Miss Ida B. Baldwin, in account with Zadig, Wollberg & Co.," handed witness.)

The entries in that book contain a correct statement of the transactions of plaintiff with the firm, so far as they go; there is still a sale of 50 shares of Chollar, at 55c., and a commission of $1 on this sale, and $2.40 interest to be entered; otherwise the book is correct. (Pass book introduced in evidence, and marked Plaintiff's Exhibit 1.)

17 (Witness produces an account.)

This account which I have just produced is a correct statement of all the transactions plaintiff had with the firm.

(Account introduced in evidence, and marked Plaintiff's Exhibit 2.)

The book and the account correspond, with the exception of the closing items, which I have mentioned.

The account, marked Plaintiff's Exhibit 2, is as follows:

Miss Ida B. Baldwin in account with Zadig, Wollberg & Co.

Dr.			Cr.		
1892.			1892.		
March 4.	25 Con. Cal. & Va., at 4.20	$105 00	M'ch 3.	Cash	$50
	Com.	1	" 4.	"	50
" 8.	25 Con. Cal. & Va., 4½	112 50	" 11.	"	60
	Com.	1	" 22.	50 Con. Cal. & Va., 4.90	245
" 22.	"	1 25	" 23.	Cash	50
" 24.	50 Chollar, 1.35	67 50	Apr. 9.	"	150
	50 Con. Cal. & Va., 5¼	262 50	" 14.	"	50
	Com.	2 30	June 18.	"	40
" 31.	Int.	1 05	July 30.	"	50
Apr. 6.	100 Con. Cal. & Va., 5	500	Oct. 24.	"	50
	Com.	2 50	Dec. 12.	"	40
" 30.	Int.	5 65	" 14.	150 Con. Cal. & Va., 1.80	270
May 31.	Int.	6 35	" 21.	50 Chollar, at 55c.	27 50
June 28.	Assmt. 50 Chollar.	25			
" 30.	Int.	6 05			
July 31.	"	6 30			
Aug. 31.	"	5 60			
Sept. 30.	"	5 50			
Oct. 31.	"	5 70			
Nov. 30.	"	4 95			
Dec. 14.	Com	1 35			
" 21.	"	1			
	Int.	2 40			
	Balance	05			
		$1,132 50			1,132 50
			Dec. 21.	By balance	05

18 Counsel hands witness three letters, purporting to be from defendants to plaintiff, dated respectively Nov. 4, Dec. 13 and Dec. 20, 1892, and an account dated Dec. 20, 1892, and the same are identified by the witness as having been sent by defendants to plaintiff, and they are marked respectively Plaintiff's Exhibits 3, 4, 5 and 6, and are offered in evidence. These exhibits are as follows:

PLAINTIFF'S EXHIBIT 3.

Office of Zadig, Wollberg & Co., stock brokers, 306 Montgomery street.

SAN FRANCISCO, *Nov. 4th*, 1892.

Miss Ida B. Baldwin, city.

DEAR MADAM: Please send us without fail tomorrow morning $75, on account, and oblige,

Yours respectfully, ZADIG, WOLLBERG & CO.
J. M.

PLAINTIFF'S EXHIBIT 4.

(Same letter-heading as Exhibit 3.)

SAN FRANCISCO, *Dec. 13th*, 1892.

Miss I. B. Baldwin, city.

DEAR MADAM: We wrote you last night, urging you to make us a payment of $100 on account, and as you made no deposit, and C. C. & Va. being assessed 50 cts., today declined so rapidly, that, in order to secure the account against loss, we were obliged to sell 150 Con. Cal. & Va. for your account, as per inclosed card.

Notwithstanding this, your account is still short.

Yours respectfully, ZADIG, WOLLBERG & CO.
M.

19 PLAINTIFF'S EXHIBIT 5.

(Same letter-heading as Exhibit 3.)

SAN FRANCISCO, *Dec. 20*, 1892.

Miss I. B. Baldwin, city:

Will please send $15 on her account, and oblige,

Respectfully, ZADIG, WOLLBERG & CO.

PLAINTIFF'S EXHIBIT 6.

(Same letter-heading as Exhibit 3.)

SAN FRANCISCO, *Dec. 20th*, 1892.

Miss I. B. Baldwin, city.

DEAR MADAM: This afternoon we were obliged to sell your 50 Chollar, as per inclosed card.

Please hand us in your pass book to be written up, which will show a credit balance of 05 cts.

Yours respectfully, ZADIG, WOLLBERG & CO.
M.

(The account, Plaintiff's Exhibit 2, handed witness.)

The first transaction between plaintiff and the firm was on March 3, 1892. She deposited $50 for the purpose of buying 25 shares of Con. Cal. & Va. We bought them at $4.20 per share; the total purchase price, which we paid, being $105, and our commission $1.

Plaintiff's order for the purchase of the 25 shares of Con. Cal. & Va. was in writing. (The order is produced and identified by witness, and introduced in evidence, and marked Plaintiff's Exhibit 7.) Said Plaintiff's Exhibit 7 is as follows:

20 PLAINTIFF'S EXHIBIT 7.

Zadig, Wollberg & Co.

Terms and Conditions upon which we do Business. Read Them.

We will act as agents and brokers in the purchase and sale, for cash only, of stocks and bonds for our principals, in all cases making or accepting full cash payment only, on purchases and sales, and will charge a commission for our services; we will loan money on stocks and bonds, charging interest at the rate of one and one-half per cent. per month, compounding monthly, on any money so loaned. All such loans will be made with the distinct understanding that all bonds and stocks upon which we make them, or upon which we advance money to pay assessments, are, and shall be and remain, the property of our principal, or of the person to whom any loan or advance is made thereon, subject only to our interest therein as pledgees, as hereinbelow specified; all stocks and bonds upon which loans or advances are made by us for any purpose, shall be deposited by the owner thereof with us, or delivered to us on his behalf, and held by us in pledge and as collateral security for the payment of any and all moneys loaned or advanced by us thereon, and of any and all commissions and interest due or to become due to us, and of any and all moneys owing to us by the owner, for any cause, at any time while we hold the same; and the proceeds of all sales of stocks or bonds of such owner shall be

applied to the payment of such loans and advances, commissions, and interest at the rate of one and one-half per cent. per month; interest at said rate shall be payable monthly upon any balance or sum then due us; any and all stocks and bonds, or any part thereof, deposited with us in pledge, may be sold to pay such indebtedness, or any part thereof, at any time, at our option and discretion,
21 at private sale or in the San Francisco stock and exchange board, or elsewhere, without notice of any kind of the time or place of sale, and without any notice whatever, and without any demand for the payment of such indebtedness, or any part thereof, and without any demand whatever, whenever such collateral security is deemed insufficient by us; and we shall be at all times the sole judges of the sufficiency of the security; demand of payment, and notice of the time and place of sale, shall be deemed waived in all cases; we shall not be obliged or required to keep on hand the identical bonds or certificates of stock purchased or pledged, but it shall meet all obligations and requirements on our part, if we shall have the same number of the same bonds, or the same number of shares of the same stock, to surrender to the owner when redeemable or properly deliverable, and properly demanded; we engage and agree to hold ourselves in readiness, and to be able at all times, to deliver to any and all owners, all stocks and bonds purchased by us as agents and brokers, or deposited with us as collateral security, upon payment to us of the amount of the indebtedness thereby secured, or due thereon. All money owing to us shall be payable in U. S. gold coin. These conditions shall not be varied by any oral agreement, and shall form part of all transactions, whether such transactions, or the orders for the purchase or sale of stocks, are oral or in writing.

SAN FRANCISCO, CAL., *3d March*, 1892.

Messrs. Zadig, Wollberg & Co.: Subject to all the above terms and conditions, which I have read, and to which I hereby agree, I hereby appoint you my agents and brokers, for the purchase and sale of stocks and bonds, for me, and on my account, and at my risk and expense, as per my orders, whether oral or written, and hereby
22 authorize you to sell any and all stocks and bonds held by you as collateral security, in the manner, and under the circumstances and conditions above specified, to pay any indebtedness, or any part thereof, which may be due from me to you.

It is expressly understood that you shall not share in any profits or losses arising from purchases or sales of stocks or bonds, made by you on my account, and that you shall have no interest in any such stocks or bonds, other than as pledgees.

In consideration of loans and advances heretofore made and hereafter to be made by you, to me, at my request, and in further consideration of the terms of your agreement above set forth, and of your acceptance of this appointment and order, I hereby expressly release and forever discharge you, of and from any and all causes and rights of action, claims and demands, of every kind and nature heretofore or now existing in my favor against you, or any of you,

on account of any and all transactions of any kind or nature, in stocks or bonds on my account, or for the recovery of any money heretofore, or now deposited by me with you or paid by me to you, for the purchase of stocks or bonds, or for any other purpose, and in consideration of the foregoing matters, I further hereby expressly ratify and confirm all past transactions between us, respecting the purchase and sale of stocks or bonds, on my account, and all deposits and payments of money heretofore made by me to you, or by you on my account, and in consideration of said matters, I further hereby undertake and agree to indemnify you against, and to hold you absolutely harmless from, all losses and liabilities of any kind or nature, on account of any and all past, present and future transactions between us, in respect to the purchase or sale of stocks or bonds, which have been, are, or may hereafter be authorized by me, either orally or in writing.

23 Subject to all of the foregoing terms and conditions, I hereby authorize and request you, as my agents and brokers, for me, as your principal, and for my account and risk, and at my expense, to

---

2.30 Buy 25 C. C. & Va.,
$50.

This order good until ——.

I. B. BALDWIN,
Address, 540 *Ellis*.

We purchased the 25 shares of Con. Cal. & Va., upon this order, and they remained in our possession as security for the balance between the amount paid by plaintiff and the purchase price and commission. This balance was $56, which she owed us.

On March 4, 1892, plaintiff deposited $50 additional, in further payment of the purchase of the 25 Con. Cal. & Va. The account then stood $106, charged to plaintiff, and $100 credited to her.

On March 7, 1892, the account was still in that condition, and on that date she gave us an order to purchase 25 shares of Con. Cal. & Va., additional. We purchased the 25 shares for her on that date, at $4.50 per share. The purchase was entered on the 8th. No additional deposit was made at that time. Plaintiff was charged with $112.50, the purchase price of the second 25 shares of Con. Cal. & Va., and $1 commission, and as the account then stood, plaintiff was charged with $219.50, and credited with $100.

On March 11, 1892, she made an additional payment of $60, which made her credit $160—as against a charge of $219.50, and we had the 50 Con. Cal. & Va., as security for the difference of $59.50.

24 On March 21, 1892, plaintiff gave us an order to sell the 50 Con. Cal. & Va., and we did so, at $4.90 per share, realizing $245 thereon, which was credited to plaintiff, and she was charged with $1.25 commission. The entries were made on the 22d. That left $184.25 to plaintiff's credit. She did not draw this money, but

on the 23d, deposited $50 additional, which made the amount to her credit $234.25, and she gave us orders to buy for her 50 Chollar and 50 Con. Cal. & Va. We bought the 50 Chollar at $1.35, making $67.50, and the 50 Con. Cal. & Va., at $5.25, making $262.50. The total purchase price of the two stocks was $330, and plaintiff was charged with this amount and $2.30 commission. This left her in our debt $98.05, and we held the stock as security for this debit balance.

On April 5, 1892, plaintiff gave us another order to purchase 100 Con. Cal. & Va., additional for her. We purchased them at $5 per share, and the purchase price $500, and $2.50 commission, were charged to her account on the 6th. On March 31st, she had also been charged with $1.05 interest. These charges brought her in our debt on April 6th, to the amount of $601.60, and we held the 150 Con. Cal. & Va., and the 50 Chollar as security therefor.

On April 9th, plaintiff paid us $150, and on the 14th $50, and these payments reduced her indebtedness to $401.60.

At the end of April and May, plaintiff was charged with interest on her account, aggregating $12, and increasing her indebtedness to $413.60. On June 18th she made a further payment of $40, thus reducing her indebtedness to $373.60, and on June 28th, we paid an assessment for her of $25, on the 50 Chollar, and on June 30th, she was charged with $6.05 interest, thus increasing her indebtedness to $404.65.

25 There were no further purchases, but various interest charges, and three additional payments.

The payments were as follows:

One of $50 on July 30th, another of $50 on October 24th, and the last on December 12th of $40.

Between June 30th and December 1st, the additional interest charges aggregated $28.05. These debits and credits left plaintiff's indebtedness on December 13th, $292.70. During the whole of this time plaintiff was in our debt, except on March 22d, when she had a credit to her account of $184.25, and left the money with us, and March 23d when she deposited $50 additional, and thus had to her credit $234.25. During the whole of that time we held all the stocks which we had purchased for her (except those sold on her order) as security for indebtedness to us.

We generally required any one who purchased stock, to make a payment of at least 40 % of the market value of the stock down in cash. Upon this deposit of 40 % being made, we would purchase the stock and hold it as security for the remaining 60 %.

(Counsel reads from the letter of defendants to plaintiff, dated December 13, 1892, and marked Plaintiff's Exhibit 4, and asks the witness what is meant by the statement, that notwithstanding the sale of the Con. Cal. & Va. stock, as stated in the letter, plaintiff's account is still short.)

A. There were still 50 shares of Chollar on the account against which plaintiff owed money. We were not willing to carry that

Chollar for the amount of money which plaintiff had on deposit, and therefore wanted an additional deposit.

We would require her to take up the stock, or give us security sufficient to hold the stock for her. Had plaintiff come to the office in response to this letter and asked how much would be re-
26 quired of her, we would have requested her to make us a payment of enough to enable us to hold the stock until she could take it up or wished to sell. It is very hard to say what amount we would have demanded. We might have asked her to take up the whole account.

There is no general rule on that subject in our office.

We might have asked her for forty (40) per cent. That would have been according to our mode of dealing generally, had we not become dissatisfied with her failure to make a payment on account of the Con. Cal. & Va.

On December 20th, we were willing, as stated in our letter of that date (Plaintiff's Exhibit 5) to accept $15 on account.

Plaintiff made no payment, and we were obliged to sell the 50 Chollar, as stated in Plaintiff's Exhibit 6, because the market price of the stock had declined, and we wished to protect the account from further loss. The stock had got to that point, where, by selling, we were fully protected, and if we had carried it, and there was a further decline, we might have suffered a loss.

When we bought stocks for plaintiff, and the certificates were delivered to us, they were put in with the rest of the stocks held by us. The stocks were mixed, and on selling, we took certificates for the number of shares of the particular stock sold, indifferently, and delivered them to the purchaser.

All these various purchases of stock made by plaintiff through us were made upon these written orders, the same as Plaintiff's Exhibit 7.

Cross-examination:

The first order was dated March 3, 1892, and is Plaintiff's Exhibit 7.

Q. Was the order carried out? Did you buy that stock?
27 A. Yes, sir, we did.

Mr. VAN NESS: We admit the stocks were bought.

WITNESS: The stock was purchased by our firm, pursuant to that order, at the S. F. stock and exchange board, from Ives & Co., through Mr. Stoutenborough, their broker.

Paper shown witness, reading as follows:

"SAN FRANCISCO, *Mch* 3, 1892.

"Mr. Marks bought of Ives & Co. 150 shares Con. Cal. & Va., at $4.20,—$630."

WITNESS: Plaintiff's 25 shares were amongst these 150. We paid for this stock.

The following check shown witness:

"No. 31,605. SAN FRANCISCO, *M'ch* 4, 1892.

"The Nevada Bank of San Francisco pay to the order of Ives & Co., for 150 Con. Cal. & Va., six hundred and thirty dollars.

"$630. ZADIG, WOLLBERG & CO."

Endorsed:

"For deposit with the Bank of California.

"IVES & CO.,"

and "Pay through S. F. clearing-house, M'ch 4, 1892, The Bank of California," and stamped "Exchanged with other banks, M'ch 4, 1892."

The COURT: They have not challenged that.

Mr. VAN NESS: It is admitted that the defendants paid Ives & Co. for the stock.

WITNESS: The stock was delivered to us—into our possession—on the next day, March 4th, for plaintiff, and we held the stock subject to her order.

The next order was dated M'ch 7, 1892. That stock was purchased in the S. F. stock and exchange board, from Geo. W. Kelly, at $4.50 per share, and we paid Kelly for the stock on March 8th, $112.50, by check, and the stock was delivered to us on the 8th for plaintiff, and we held it subject to her order.

28 The next order to buy was dated M'ch 23d.

The COURT: Are the facts the same in relation to the purchase on the 23d, as in relation to the previous purchases?

WITNESS: Yes, sir.

Q. That is, you bought the stock in open market, you paid for it, and it was delivered to you for plaintiff, and you held it subject to her order?

A. Yes, sir.

Defendants offer in evidence plaintiff's order of M'ch 23d. Plaintiff's counsel admits that all of plaintiff's orders were in writing, and were in all respects similar to Plaintiff's Exhibit 7, except as to the dates, the number of shares, name of the company, and that some were to buy and others were to sell.

WITNESS: We at all times had the stock we purchased for plaintiff in our possession, so as to be able to deliver it to her at any time she demanded it.

When we purchased stocks the numbers of the certificates delivered to us were stated on the tags given us by the brokers. All certificates of stock are numbered, and we were able at all times to trace the particular certificates of each customer by the number that was on them, and on the tag of the broker from whom we bought them. So far as we were concerned, these purchases and sales of stock by us for plaintiff were actual and *bona fide* transactions in each instance. There was no dealing in differences be-

tween us, without an actual delivery of the stock. The stock was bought and delivered to us and paid for, and held subject to plaintiff's order at all times, by the payment of the balance due, and always in our possession for that purpose.

29 Redirect examination:

The way the business was done was this: Plaintiff gave us an order to buy 25 shares of Con. Cal. & Va., through Mr. Marks, the board member of our firm, and we would purchase in the S. F. stock & exchange board from any of the brokers in the board. If at the same time as we had plaintiff's order we had orders from other customers for 100 shares, we would purchase the 125 shares from Brown, Smith or Jones, as the case might be, without regard to the particular person for whom we were buying, except to get from the broker from whom we were buying the number of shares we wanted, at the price at which we were limited. If we had orders amounting to 500 shares of Con. Cal. & Va., at certain limits, we simply said to Mr. Marks: "Go into the board and buy 500 shares of Con. Cal. & Va. at such and such a figure," without then necessarily telling him for whom the stock was intended, and the following day, the proper time for delivery from the brokers, they would send certificates to our office, and we would pay for them according to the price at which we had bought the stock in the board, and that stock would be put into our stock wallet, among all the stocks we had in our office, without regard to the particular person for whom it was bought.

We were buying and selling stocks for different people, and the stocks that were bought went into our wallet, and stocks sold came out of it without regard to whose particular shares they were; but we had on hand at all times, the full number of shares belonging to our customers, so that if plaintiff and all our other customers at any time wanted to take their stock we had sufficient stock on hand to deliver to them.

We were ready to deliver to plaintiff certificates for all the stock we purchased for her, on payment of what might be due us,
30 and it was in our hands for that purpose. We never sell short, and never take orders of that sort, and had sufficient stocks on hand at all times to meet any demand made on us by our customers, and to comply with all demands of all our customers.

Mr. VAN NESS: I would like the admission that the Chollar and Con. Cal. & Va. are corporations, duly incorporated under the laws of this State, and do business here in this city.

Mr. TAUSZKY: Yes, sir.

Mr. VAN NESS: We rest.

Mr. TAUSZKY: I will move for a nonsuit upon the ground that it has not been shown that there was any transaction in margins between these parties, such as is inhibited by the Constitution; there is no evidence here showing what constitutes a margin contract, or

that there was any contract for the sale of stocks on margin between plaintiff and defendants.

Motion for nonsuit denied. Defendants except.

ALBERT S. WOLLBERG was thereupon recalled as a witness for defendants:

Plaintiff's attorney admitted that the witness is an expert in stock transactions.

WITNESS: I consider a transaction on margin one in which a party agrees to deliver a certain number of shares at some future time, and deposits a certain amount of money in earnest of his fulfilling his contract. An essential element where there is a contract for the sale of stock on margin is time.

Cross-examination:

Puts and calls are margin contracts. I don't consider a contract where the broker purchases stock for a party on a margin of a certain percentage, and carries it upon a margin of certain percentage, a marginal contract.

31 Q. Isn't it a fact that where you speak of the percentage which you require to be deposited you always speak of that amount as "40 % margin," or "50 % margin," or whatever other percentage it may be?

A. No, sir. I don't consider it in that way; I don't say, it, either.

I have been in the stock business sixteen years.

Q. Do you mean to say that up to the time of the decision in Cashman *v.* Root, where you buy and carry stocks upon a margain of 40 % or 50 %, as the case may be, that that amount was not specified as 40 % margin or 50 % margin in the stock business?

A. I do.

Q. How do you designate it in your business?

A. I designate it as a deposit—a deposit on the purchase of the stock.

Q. Did you ever buy for a customer stocks such as you call margins stocks?

A. No, sir.

Q. You don't deal in options?

A. No, sir.

We have no rule in our office that a deposit required of customers shall be of a given percentage of the purchase price.

It depends on who the customers are. If they are parties who we know to be responsible, and who we know will pay for the stocks either today or tomorrow, or from whom we can get the money at any time, we demand a small deposit, or perhaps none at all. Others, whom we don't trust, we demand 80 % sometimes. The general rule is 40 % or 50 %, just as the case may be. We have no specified amount. We don't buy for any who come in—only those we decide on as customers.

32 We have not now any customers from whom we demand a deposit as high as 80 %. I remember cases in which we have demanded as high as 80 % by way of deposit, but I can't specify them. The usual amount demanded from customers with whom we are willing to deal is, say, 40 %, and as long as they keep a deposit in our hands which is equal to 40 % of the then selling price of the stock, we are willing to carry the stock and we charge interest.

Redirect examination:

I have been engaged with defendants' firm off and on for four years.

During my entire connection with the firm no transactions of the character of those had with plaintiff have been considered or called margin transactions in the office, and during those four years, where customers have been called upon for further deposits, such demands have never been called margins, and our calling these demands upon customers for deposits, deposits, and not margins, has not been as a consequence of the decision in Cashman *v.* Root. We called them deposits long before that.

Thereupon the testimony on both sides was closed, and the respective counsel for plaintiff and defendants argued the case, and submitted the same to the court for consideration and decision, and thereafter, on the 11th day of August, 1893, the court made, rendered, signed and filed its findings and decision herein, in favor of plaintiff and against defendants, and thereafter, on the 16th day of August, 1893, judgment was entered herein, in favor of plaintiff and against defendants accordingly.

Thereafter, to wit: on the 21st day of August, 1893, defendants served upon plaintiff and filed herein a notice that they intend to move for a new trial of the action, which notice is in the words and figures following:

33 (Title of Court and Cause.)

To the plaintiff in the above-entitled action and to T. C. Van Ness, Esq., her attorney:

Please take notice that the defendants in said action, intend to move and make application to the above-named hon. court, to vacate and set aside its findings and decision, heretofore, to wit: on the 11th day of August, 1893, rendered and filed herein, and the judgment heretofore, to wit: on the 16th day of August, 1893, entered herein, and to grant a new trial of said action.

Said motion and application will be made upon the following grounds, and for the following causes, materially affecting the substantial rights of said defendants.

First. Insufficiency of the evidence to justify the said findings, decision and judgment.

Second. That said findings, decision and judgment, were, and are, against law.

Third. Errors in law occurring at the trial of said action, and excepted to by said defendants.

Said motion and application will be made upon this notice, and upon a bill of exceptions and statement of the case.

Yours, etc., EDMUND TAUSZKY,
Attorney for Defendants.

San Francisco, August 21, 1893.

Endorsed: Due service of within notice is hereby admitted, this 21st day of August, 1893. T. C. Van Ness, attorney for plaintiff. Filed, August 21st, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

34 Defendants hereby assign and specify the following errors in law, occurring upon the trial of said action, and excepted to by them, and upon which they will rely:

1. The court erred in denying the motion of defendants for a nonsuit.

2. The court erred in denying the motion of defendants for a nonsuit, for the following reasons:

A. Because it was not shown that there was any transaction in margins between plaintiff and defendants, such as is inhibited by the Constitution.

B. Because no evidence was offered or introduced by plaintiff, showing what constitutes a margin contract.

C. Because no evidence was offered or introduced by plaintiff, showing that there was any contract for the sale of stocks on margin between plaintiff and defendants.

Defendants hereby assign and specify the following particulars in which the evidence is insufficient to justify or sustain the decision herein.

1. There is no evidence to sustain the finding, that when the amount paid to defendants upon account of the purchase price of stocks was less than said price, they would carry said stock for the person for whom purchased.

2. There is no evidence to sustain the finding that, "in carrying shares of stock for persons for whom purchased, it was customary with defendants to protect themselves against a decline in the value of said stocks, to demand and receive from said persons for whom the same was purchased, upon a decline in the value of said stock from the price at which purchased, an additional deposit,
35 which, when added to deposits previously made, would leave a margin of value in said shares of stock in excess of the amount or amounts deposited, which would protect the said defendants from loss, by reason of the decline in the value of said shares, and in case said additional deposit, when so called for was not made, to sell said shares of stock so carried for such persons."

3. There is no evidence to sustain the finding that defendants, pursuant to their custom as in finding one stated, or pursuant to any custom, purchased for plaintiff shares of the capital stock of certain mining corporations.

4. There is no evidence to sustain the finding that defendants purchased shares of stock for plaintiff, as in finding two stated.

5. There is no evidence to sustain the finding that, "at all of the times in the complaint mentioned the gross purchase price of the shares of stock purchased by defendants upon and for the account of plaintiff, as in finding three stated (or otherwise), was in excess of the gross amount, or amounts, deposited by plaintiff with defendants on account of said purchase."

6. There is no evidence to sustain the finding that defendants "from time to time, called upon, demanded and received from plaintiff additional deposits of money to make good such (or any), margin between the then and current market value of said shares of stock so held for plaintiff and the amount or amounts so as aforesaid deposited by plaintiff as would give to defendants the margin of security by them in their business demanded and required."

7. There is no evidence to maintain the finding that defendants, without the consent of plaintiff, sold and disposed of, or sold or disposed of, the shares of stock, or any of them, held by them as security or otherwise.

36 8. There is no evidence to sustain finding No. five. On the contrary, the evidence shows that, in addition to the sales mentioned in said finding, there was a sale on December 21, 1892, of 50 shares of the capital stock of the Chollar Mining Co., for $27.50, which amount was credited to plaintiff, and that on said date plaintiff was charged with the sum of one dollar commission on said sale, and with the sum of two dollars and forty cents interest to said date, on her debit balance, and that on said day her account was closed, and, instead of showing a debit balance against her of $24.05, showed a credit in her favor of 5 cts.

9. There is no evidence to sustain the finding that prior to the commencement of this action plaintiff demanded of defendants the return to plaintiff of all or any of the moneys deposited by her with defendants, or that to return the same or any part thereof defendants refused.

10. There is no evidence or law to sustain the finding or conclusion that plaintiff is entitled to judgment against defendants for the sum of $590, or any sum.

11. There is no evidence or law to sustain the finding or conclusion that plaintiff is entitled to judgment for interest on the various sums deposited by her with defendants, from the respective dates of deposit of each sum, or from any date prior to judgment.

12. The evidence is insufficient to justify the decision that the transactions, or any of them, between plaintiff and defendants, were, or constituted, sales, or a sale, of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day.

37 13. The evidence is insufficient to justify the decision that the transactions, or any of them, between plaintiff and defendants, were, or constituted, sales, or a sale, of shares of the capital stock of any corporation or association, on margin.

14. The evidence is insufficient to justify the decision that the

transactions, or any of them, between plaintiff and defendants, were, or constituted, sales, or a sale, of shares of the capital stock of any corporation or association, to be delivered at a future day.

15. The evidence is insufficient to justify the decision, that by means of the transactions, or any of them, had between plaintiff and defendants, plaintiff was enabled to purchase shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day.

16. The evidence is insufficient to justify the decision, that by means of the transactions, or any of them, had between plaintiff and defendants, plaintiff was enabled to purchase shares of the capital stock of any corporation or association on margin.

17. The evidence is insufficient to justify the decision, that by means of the transactions, or any of them, had between plaintiff and defendants, plaintiff was enabled to purchase shares of the capital stock of any corporation or association, to be delivered at a future day.

Defendants hereby specify that the decision is against law, in this:

1st. That none of the transactions had between plaintiff and defendants were, or constituted, sales, or a sale, of the capital stock of any corporation or association on margin, or to be delivered at a future day, or were in anywise void or illegal.

38 2d. That by means of none of the transactions had between plaintiff and defendants was plaintiff enabled to purchase shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, or to do any act or to enter into any transaction prohibited by the Constitution, or that was in anywise void, illegal or unlawful.

And inasmuch as the foregoing matters do not appear of record herein, and in commemoration thereof, defendants hereby offer and present the above and foregoing bill of exceptions and statement of the case on their motion for a new trial, to the judge who heard and tried said action, within due time, and ask that the same may be settled and allowed, as provided by law.

EDMUND TAUSZKY,
Attorney for Defendants.

The above and foregoing bill of exceptions and statement of the case on motion for a new trial was served upon me within due time, and is correct, and may be settled and allowed.

September 25th, 1893.

T. C. VAN NESS,
Attorney for Plaintiff.

The above and foregoing bill of exceptions and statement of the case on motion for new trial was duly presented to me for settlement within due time, and I hereby certify that I have settled and allowed the same and that it is correct

EUGENE R. GARBER,
Judge of the Superior Court of the City and County of San Francisco, Presiding in Dep't 1 Thereof.

San Francisco, Sept. 26, 1893.

39 Endorsed: Due service of within bill and statement is hereby admitted this 13th day of September, 1893. T. C. Van Ness, att'y for pl'ff. Filed Sept. 26th, 1893. M. C. Haley, clerk, by John A. Sullivan, deputy clerk.

Order Denying Motion for a New Trial.

In open court, Friday, January 26th, A. D. 1894.

(Title of Court and Cause.)

In this action the motion for a new trial having been heretofore submitted to the court for consideration and decision, and the court having considered the same and being fully advised in the premises, it is ordered that said motion be and the same is hereby denied. Minute Book No. 49, dep't 1, p. 196.

Notice of Appeal.

(Title of Court and Cause.)

To the plaintiff in the above-entitled action and to T. C. Van Ness, Esq., her attorney:

Please take notice that the defendants in said action hereby appeal to the supreme court of the State of California, from the judgment entered in said action in said superior court, on the 16th day of August, 1893, in favor of plaintiff and against defendants for the sum of $642.26, interest and costs, and from the whole thereof.

Please take notice further that said defendants also hereby appeal to said supreme court, from the order made and entered in said action in said superior court, on the 26th day of January, 1894, denying the motion of said defendants for a new trial of said action.

Yours, etc., EDMUND TAUSZKY,
Attorney for Defendants.

San Francisco, February 9th, 1894.

40 Endorsed: Due service of the within is hereby admitted this 9th day of February, 1894. T. C. Van Ness, attorney for plaintiff. Filed Feb'y 9, 1894. M. C. Haley, clerk, by Jno. M. Sullivan, deputy clerk.

Stipulation and Certificate.

It is hereby stipulated and agreed that the foregoing are full, true and correct copies of the judgment-roll in the above-entitled action; of defendants' notice of intention to move for a new trial of said action; of the bill of exceptions and statement of the case on said motion for a new trial; of the order denying said motion for a new trial, and of the notice of appeal from the judgment herein, and from the order denying said motion for new trial, all on file and of record in said action in the superior court of the city and county of San Francisco.

It is hereby further stipulated and certified that the foregoing shall constitute the transcript on appeal to the supreme court of this State from the judgment entered in said action, and from the order denying defendants' motion for a new trial thereof, and that a proper and sufficient undertaking on appeal, in due form, has been properly and in due time filed in support of said appeals.

T. C. VAN NESS,
Attorney for Plaintiff and Respondent.
EDMUND TAUSZKY,
Attorney for Defendants and Appellants.

41 Due service of within transcript on appeal is hereby admitted this 24 day of February, 1894.

T. C. VAN NESS,
Attorney for Plaintiff and Respondent.

42 In the Supreme Court of the State of California.

IDA B. BALDWIN, Plaintiff and Respondent,
vs.
HERMANN ZADIG *et al.*, Copartners under the Firm Name of Zadig, Wollberg & Co., Defendants and Appellants. } No. 15652.

It is hereby stipulated that the defendants and appellants in the above-entitled action may have 20 days from and after the 26 day of March, 1894, within which to serve and file their opening brief therein.

T. C. VAN NESS,
Attorney for Plaintiff and Respondent.

Dated San Francisco, March 22nd, 1894.

So ordered by the court.
McFARLAND, *Act'ng C. J.*

March 23, '94.

Filed M'ch 23rd, 1894.

L. H. BROWN, *Clerk*,
By G. E. MADISON, *Deputy.*

43 In the Supreme Court of the State of California, Department No. 1.

IDA B. BALDWIN, Pl'ff and Resp'd't,
vs.
HERMANN ZADIG *et al.*, Def'ts and Ap'l'nts. } No. 15652.

It is hereby stipulated that the defendants and appellants in the above-entitled action may have ten (10) days from and after the

14th day of August, 1894, within which to serve and file their closing brief therein.

Dated San Francisco, August 13th, 1894.

T. C. VAN NESS,
Attorney for Plaintiff and Resp'd't.

So ordered by the court.
BEATTY, *C. J.*

Filed August 14th, 1894.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY, *Deputy.*

44 Original.

No. 15652.

In the Supreme Court of the State of California, Department No. 1.

IDA B. BALDWIN, Plaintiff and Respondent,
vs.
HERMAN ZADIG *et al.*, Defendants and Appellants.

Closing Brief on Behalf of Appellants.

Edmund Tauszky, attorney for defendants and appellants.

Filed this 17th day of August, 1894.

L. H. BROWN, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

45 In the Supreme Court of the State of California, Department No. 1.

IDA B. BALDWIN, Plaintiff and Respondent,
vs.
HERMAN ZADIG *et al.*, Defendants and Appellants. } No. 15652.

* * * * * * *

46 VIII.

The Constitutional Provision Contravenes the Constitution of the United States.

In Irwin *v.* Williar, 110 U. S., 508, the Supreme Court of the United States said:

"The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of

such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

This was approved in Embrey *v.* Jemison, 131 U. S., 345.

See, also, White *v.* Barber, 123 U. S., 419.

In Bibb *v.* Allen, 149 U. S., 492, the court said:

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired."

47 It may be taken to be firmly established, therefore, that contracts for future delivery, where there is an intention to deliver, are not gambling contracts.

We do not question the so-called police power of a State to enact laws against gambling in any form, as being contrary to the well being and good morals of the people; but, apart from this police power, the State has no authority to interfere with the liberty and freedom of contract.

In this State, as in others, *bona fide* contracts for the sale of any commodity, such as wheat, for instance, on margin, or to be delivered at a future day, are valid.

In making void contracts for the sale of stock of corporations or associations on margin or to be delivered at a future day, the State constitution contravenes section 1 of the fourteenth amendment to the United States Constitution, in abridging the privileges and immunities of citizens of the United States, and depriving persons of liberty and property without due process of law; and denying to persons making such contracts the equal protection of the laws.

A vast amount of the commerce of the country is conducted through the agency of corporations and associations. Their stock is owned by multitudes of persons, and represents the property thereof. Title to this stock passes by endorsement and delivery of the certificates, and dealings in these certificates represent, to a great degree, dealings in this property.

These corporations and associations are formed under the laws of the various States, and the power to regulate commerce among the several States is vested in Congress, by section 8, of art. 1, of the United States Constitution.

The provision of our State constitution, in question here, is not limited to California corporations and associations, but em-

48 braces all; and thus not only interferes with the liberty of contract, but also with interstate commerce. Such interference is not so much with the corporations as with individuals in dealing in their stock. Our constitution thus discriminates between property represented by the stock of corporations and property held by individuals, and restricts individuals in the mode and manner of dealing in the former. We submit that the State has no such

power, and that the provision in question, failing to distinguish between *bona fide* contracts and gambling contracts, is not a police regulation, and therefore cannot be upheld on that ground.

Respectfully submitted.

EDMUND TAUSZKY,
Attorney for Defendants and Appellants.

49 Due service of the within is hereby admitted this 16th day of August, 1894.

T. C. VAN NESS,
Attorney for Respondent.

50 Filed Dec. 1st, 1894. L. H. Brown, clerk, by Geo. E. Madison, deputy.

Department One.

BALDWIN, Respondent, *v.* ZADIG *et al.*, Appellants. } No. 15652.

This cause involves similar questions to those presented in Kullman *vs.* Simmens, No. 15098, this day decided, and the other cases therein referred to. The agreement between the parties in Wetmore *vs.* Barrett, 8 Cal. Dec., p. 20, included all the terms of the agreement under which the transactions between the plaintiff and defendant herein were had, and nearly all the points presented on this appeal were presented and considered in that case. The court, however, erred in the present case in allowing interest to the plaintiff upon the several sums of money which she paid to the defendants. This money was not loaned by her to the defendants, but was voluntarily placed by her in their hands for an illegal purpose. As the money was applied by the defendants to the express purpose for which the plaintiff placed it in their hands, she cannot claim that it was detained by them from her until after she had made a demand for its return. Both of the parties to the transaction were *in pari delicto* and, except for the provision of the constitution, there would be no right of recovery in the plaintiff, and we think that this right of recovery must be measured by the terms of the constitution in which it is given.

The court below is directed to modify the judgment by deducting therefrom the amount owed for interest on the sums deposited by the plaintiff with the defendant, and as so modified the judgment and order will stand affirmed.

HARRISON, *J.*

We concur.

GAROUTTE, *J.*
VAN FLEET, *J.*

51 Filed Dec. 31, 1894. L. H. Brown, clerk, by G. E. Madison, deputy.

In Bank.

BALDWIN, Respondent, *v.* ZADIG *et al.*, Appellants. } No. 15652.

I dissent from the order denying a rehearing in this case.

The judgment, in my opinion, is not sustained by the findings. It is nowhere found that transactions in question were sales of stock on margin or for future delivery, nor do the special facts found necessarily imply such sales. That the evidence would have sustained such a finding may be true, but that is not sufficient. This court cannot take evidence, however conclusive, in place of a finding necessary to sustain the judgment.

BEATTY, *C. J.*

52 *Copy of Register Entries, Register Number 30, Clerk's Office, Supreme Court of California.*

IDA B. BALDWIN, Respondent, *vs.* HERMANN ZADIG *et al*, Copartners under the Firm Name of Zadig, Wollberg & Company, Appellants. } 15652. San Francisco.

T. C. Van Ness, Edmund Tauszky.

1894, February 24th.—Filed transcript, San Francisco, $15.00.
March 23rd.—Filed stipulation and order; appellants twenty days from March 26th to file brief.
April 6th.—Filed brief on behalf of appellants.
August 4th.—Filed respondent's points and authorities.
August 14th.—Filed stipulation and order; appellants ten days.
August 17th.—Filed closing brief on behalf of appellants.
August 29th.—Argued and submitted. (1.)
December 1st.—The court below is directed to modify the judgment by deducting therefrom the amount allowed for interest on the sums deposited by the plaintiff with the defendants, and as so modified the judgment and order will stand affirmed.

HARRISON, *J.*

We concur.

GAROUTTE, *J.*
VAN FLEET, *J.*

December 18th.—Filed petition for hearing in bank, San Francisco, $5.00.

December 29th.—Rehearing denied.

THE COURT.
B.

53 Dissenting opinion.
BEATTY, *C. J.*

1895, January 3rd.—Remittitur to county clerk.
15th.—Filed petition for writ of error, San Francisco, $.50.
" Filed assignment of errors, San Francisco, .50.
" Filed writ of error, San Francisco, .50.
" " bond on writ of error, San Francisco, .50.
16th.—Filed citation, San Francisco, .50.

54 *Extracts from Minutes of Supreme Court of California, Department No. 1.*

Page 276.

WEDNESDAY, *August 29th*, 1894.

BALDWIN *vs.* ZADIG. } 15652.

Cause argued by Edmund Tauszky for appellants and submitted.

Page 358.

SATURDAY, *December 1st*, 1894.

BALDWIN *vs.* ZADIG. } 15652.

The court below is directed to modify the judgment by deducting therefrom the amount allowed for interest on the sums deposited by plaintiff with the defendants, and, as so modified, the judgment and order will stand affirmed.

HARRISON, *J.*

We concur.

GAROUTTE, *J.*
VAN FLEET, *J.*

55 *Extract from Minutes of Supreme Court of California, in Bank.*

Page 392.

MONDAY, *December* 31*st*, 1894.

BALDWIN *vs.* ZADIG } 15652.

Rehearing denied.

THE COURT.

Dissenting opinion.
BEATTY, *C. J.*

56 *Petition for Writ of Error to the Supreme Court of California.*

IDA B. BALDWIN, Plaintiff, *vs.* HERMANN ZADIG *et al.*, Defendants.

SAN FRANCISCO, CALIFORNIA, *January* 10*th*, 1895.

57 *Petition for Writ of Error to the Supreme Court of California.*

IDA B. BALDWIN, Plaintiff, *vs.* HERMANN ZADIG *et al.*, Defendants.

To the Honorable William H. Beatty, chief justice of the supreme court of the State of California:

The petition of Hermann Zadig, Joseph Wollberg, and Joseph Marks, of San Francisco, California, for a writ of error to the supreme court of the State of California, respectfully represents:

I.

That heretofore, to wit, on the thirty-first day of December, 1892, one Ida B. Baldwin commenced an action in the superior court of the city and county of San Francisco, State of California, against your petitioners, as copartners under the firm name of Zadig, Wollberg & Company, to recover from them the sum of five hundred and ninety-five dollars, alleged to have been received by your petitioners for the use and benefit of said plaintiff within two years theretofore, together with interest thereon and costs of suit.

II.

That the complaint in said action was in the ordinary form of a complaint for money had and received, and did not otherwise indicate the nature or character of plaintiff's alleged cause of action.

III.

That thereafter, to wit, on the seventh day of March, 1893,
58 your petitioners duly filed their answer to said complaint, wherein they denied that they were or are indebted to said plaintiff in any sum whatsoever.

IV.

That according to the laws of the State of California and the practice there prevailing, said answer was sufficient to put in issue the right of recovery on the part of said plaintiff.

V.

That thereafter, to wit, on the 29th day of March, 1893, the said action was tried by said superior court upon the issues made by said pleadings.

VI.

That upon the trial of said action said plaintiff claimed, and it for the first time appeared that she claimed, that the money sought to be recovered by her was paid by her to defendants on contracts for the sale of shares of the capital stock of corporations on margin, and she sought to recover said moneys under and by virtue of section 26, article IV, of the constitution of the State of California, wherein it is provided as follows, to wit: "All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

VII.

That there was but one witness upon the trial of said
59 action who testified both in behalf of plaintiff and your petitioners, and that there was no conflict in the evidence.

VIII.

That it appears from the evidence that your petitioners were stock brokers, doing business in San Francisco, California, under the firm name of Zadig, Wollberg & Company, and that your petitioner Joseph Marks was a member of the San Francisco stock and exchange board, an association organized and existing in said city, and that plaintiff had a number of transactions with your petitioners between the third day of March and the twenty-first day of December, 1892, and that these transactions involved in all two hundred shares of the capital stock of the Consolidated California and Virginia Mining Company, a California corporation, and fifty shares of the capital stock of the Chollar Mining Company, also a California corporation, and that all of said transactions were had under similar contracts.

IX.

That the following is the first contract entered into between the parties, to wit:

"Zadig, Wollberg & Co.

Terms and Conditions upon which We Do Business. Read Them.

We will act as agents and brokers in the purchase and sale, for cash only, of stocks and bonds for our principals, in all cases making or accepting full cash payment only, on purchases and sales, and will charge a commission for our services; we will loan money on stocks and bonds, charging interest at the rate of one and one-half per cent. per month, compounding monthly, on any money so
60 loaned. All such loans will be made with the distinct understanding that all bonds and stocks upon which we make them, or upon which we advance money to pay assessments, are, and shall be and remain, the property of our principal, or of the person to whom any loan or advance is made thereon, subject only to our interest therein as pledgees, as hereinbelow specified; all stocks and bonds upon which loans or advances are made by us for any purpose, shall be deposited by the owner thereof with us, or delivered to us on his behalf, and held by us in pledge and as collateral security for the payment of any and all moneys loaned or advanced by us thereon, and of any and all commissions and interest due or to become due to us, and of any and all moneys owing to us by the owner, for any cause, at any time while we hold the same; and the proceeds of all sales of stocks or bonds of such owner shall be applied to the payment of such loans and advances, commissions, and interest at the rate of one and one-half per cent. per month; interest at said rate shall be payable monthly upon any balance or sum then due us; any and all stocks and bonds, or any part thereof, deposited with us in pledge, may be sold to pay such indebtedness, or any part thereof, at any time, at our option and discretion, at private sale or in the San Francisco stock and exchange board, or elsewhere, without notice of any kind of the time or place of sale, and without any notice whatever, and without any demand for the payment of such indebtedness, or any part thereof, and without any demand whatever, whenever such collateral security
is deemed insufficient by us; and we shall be at all times the
61 sole judges of the sufficiency of the security; demand of payment, and notice of the time and place of the sale, shall be deemed waived in all cases; we shall not be obliged or required to keep on hand the identical bonds or certificates of stock purchased or pledged, but it shall meet all obligations and requirements on our part, if we shall have the same number of the same bonds, or the same number of shares of the same stock, to surrender to the owner when redeemable or properly deliverable, and properly demanded; we engage and agree to hold ourselves in readiness, and to be able at all times, to deliver to any and all owners, all stocks and bonds purchased by us as agents and brokers, or deposited with us as collateral security, upon payment to us of the amount of the

indebtedness thereby secured, or due thereon. All money owing to us shall be payable in U. S. gold coin. These conditions shall not be varied by any oral agreement, and shall form part of all transactions, whether such transactions, or the orders for the purchase or sale of stocks, are oral or in writing.

SAN FRANCISCO, CAL., *3rd M'ch*, 1892.

Messrs. Zadig, Wollberg & Co.:

Subject to all the above terms and conditions, which I have read, and to which I hereby agree, I hereby appoint you my agents and brokers, for the purchase and sale of stocks and bonds, for me, and on my account, and at my risk and expense, as per my orders, whether oral or written, and hereby authorize you to sell any and all stocks and bonds held by you as collateral security, in the manner, and under the circumstances and conditions above specified, to pay any indebtedness, or any part thereof, which may be due from me to you.

62

It is expressly understood that you shall not share in any profits or losses arising from purchases or sales of stocks or bonds, made by you on my account, and that you shall have no interest in any such stocks or bonds, other than as pledgees.

In consideration of loans and advances heretofore made and hereafter to be made by you, to me, at my request, and in further consideration of the terms of your agreement above set forth, and of your acceptance of this appointment and order, I hereby expressly release and forever discharge you, of and from any and all causes and rights of action, claims and demands, of every kind and nature heretofore or now existing in my favor against you, or any of you, on account of any and all transactions of any kind or nature, in stocks or bonds on my account, or for the recovery of any money heretofore, or now deposited by me with you or paid by me to you, for the purchase of stocks or bonds, or for any other purpose, and in consideration of the foregoing matters, I further hereby expressly ratify and confirm all past transactions between us, respecting the purchase and sale of stocks or bonds, on my account, and all deposits and payments of money heretofore made by me to you, or by you on my account, and in consideration of said matters, I further hereby undertake and agree to indemnify you against, and to hold you absolutely harmless from, all losses and liabilities of any kind or nature, on account of any and all past, present and future transactions between us, in respect to the purchase or sale of stocks or bonds, which have been, are, or may hereafter be authorized by me, either orally or in writing.

63

Subject to all of the foregoing terms and conditions, I hereby authorize and request you, as my agents and brokers, for me, as your principal, and for my account and risk and at my expense, to—

2.30 Buy 25 C. C. & Va.,
$50.

This order good until ——. I. B. BALDWIN,
Address, 540 *Ellis*."

X.

That all of the subsequent contracts entered into between the parties were in precisely similar language and contained the same terms and conditions as said first contract, the only difference being in the dates and in the order either to buy or sell a stated number of shares of a particular stock.

XI.

That thereafter, to wit, on the eleventh day of August, 1893, said superior court, pursuant to the law and practice of California, made its findings and decision in writing and found that plaintiff is entitled to judgment against your petitioners for five hundred and ninety dollars, with interest on the several parts thereof from the respective dates of payment, and thereafter, on the sixteenth day of August, 1893, judgment was entered against your petitioners accordingly.

64 XII.

That thereafter, on the twenty-first day of August, 1893, and within due time and according to the law and practice of California, your petitioners gave notice of their intention to move for a new trial of said action upon the grounds that the evidence was insufficient to justify said findings, decision, and judgment, and that the same were and are against law.

Said motion was based and made upon a statement of the case, which was duly settled by the judge of said superior court; that in said statement your petitioners specified as one of the grounds for said motion that there is no evidence or law to sustain the finding or conclusion that plaintiff is entitled to judgment against defendants for the sum of five hundred and ninety dollars or any sum; that in said statement your petitioners also specified that said decision is against law, in this, that none of the transactions had between plaintiff and your petitioners were or constituted sales or a sale of the capital stock of any corporation or association on margin or to be delivered at a future day or were in anywise void or illegal.

XIII.

That thereafter, on the twenty-sixth day of January, 1894, said superior court denied said motion for a new trial, and thereafter, on the ninth day of February, 1894, and within due time and according to the law and practice of California, your petitioners appealed to the supreme court of the State of California from said
65 judgment and from said order denying said motion for a new trial, and thereafter, on the twenty-fourth day of February, 1894, duly filed their transcript on said appeals in said supreme court.

XIV.

That the supreme court of the State of California consists of two departments, and that said appeals were duly assigned to depart-

ment No. 1 of said supreme court for hearing and determination, and that under the rules of said supreme court appellants shall file with the clerk their points and authorities within thirty days after the filing of the transcript and within thirty days thereafter the respondents shall file their points and authorities and within ten days thereafter appellants may file a reply, and that all of said points and authorities constitute part of the record of the appeal in said supreme court.

XV.

That your petitioners filed their brief on the sixth day of April, 1894, and said plaintiff filed her brief on the fourth day of August, 1894, having obtained extensions of time until that date within which to do so, and that your petitioners filed their reply brief on the seventeenth day of August, 1894, having obtained extensions until that date to do so.

XVI.

That in said reply brief your petitioners claimed that the provision of the constitution of the State of California upon which this action is based contravenes the Constitution of the United States, and your petitioners specially set up and claimed in said
66 reply brief that in making void contracts for the sale of stock of corporations or associations on margin or to be delivered at a future day the State constitution contravenes section 1 of the fourteenth amendment to the United States Constitution in abridging the privileges and immunities of citizens of the United States and depriving persons of liberty and property without due process of law and denying to persons making such contracts the equal protection of the laws, and also that said constitutional provision interferes with interstate commerce and is in contravention of section 8 of article I of the United States Constitution.

That said appeals were set for argument in said supreme court of the State of California, department No. 1, on the twenty-ninth day of August, 1894, and were on said day argued on behalf of your petitioners before said department, and in the oral argument of said appeals as aforesaid your petitioners again specially set up and claimed that said provision of the constitution of the State of California contravenes the Constitution of the United States and pointed out the particular provisions of the Constitution of the United States relied upon, which were the same as those set forth in said reply brief; that thereupon said appeals were submitted to said department of said supreme court for decision; and thereafter, on the first day of December, 1894, said supreme court rendered its decision on said appeals and in and by said decision affirmed the said judgment and order denying a motion for a new trial except as to the interest which was allowed to said plaintiff by the trial court.
67 The order of said supreme court was that the court below is directed to modify the judgment by deducting therefrom the amount allowed for interest on the sums deposited by the plaintiff

with the defendants, and as so modified the judgment and order will stand affirmed.

XVII.

That under the constitution of the State of California a judgment of a department of the supreme court of said State becomes final unless a hearing in bank is granted before the expiration of thirty days after such judgment is pronounced.

XVIII.

That your petitioners filed a petition for hearing in bank in said supreme court on the eighteenth day of December, 1894, and that said supreme court on the thirty-first day of December, 1894, denied said petition, and that said judgment pronounced by said department of said supreme court is the final judgment of the highest court of the State of California in which a decision in said action can be had, and that in said action was drawn in question the validity of a provision of the constitution of the State of California on the ground of its being repugnant to the Constitution of the United States, and the decision of said supreme court was in favor of the validity of said provision of the constitution of the State of California.

XIX.

That said supreme court in its opinion did not directly pass upon the validity of said provision of the constitution of the
68 State of California, but said court could not have reached its conclusion adverse to your petitioners without holding that said provision of the constitution of the State of California is not repugnant to the Constitution of the United States, and the adjudication of such question of repugnancy was necessarily involved in the disposition of said appeals by said supreme court of the State of California.

XX.

That the plaintiff in said action based her right of action solely upon the provision of the constitution of the State of California herein set forth and upon the contract herein set forth and transactions had thereunder, the money which she claimed herein having been paid pursuant to said contract; that the only issues made and tried in this case at any time were whether the contract between the parties constituted a contract for the sale of the capital stock of corporations on margin or to be delivered at a future day; and, if they did, whether the provision of the constitution of the State of California giving the plaintiff the right to recover money paid on such contracts is repugnant to the Constitution of the United States.

That your petitioners at all times claimed that there was no contract for the sale of any stock of any corporation on margin or otherwise between them and plaintiff, and that the relation of

vendor and vendee never existed between them, and that your petitioners were merely the agents and brokers of said plaintiff in the purchase of stock, receiving a commission for making said
69 purchases, and that plaintiff was their principal, and that said stocks were purchased of third persons for cash, and that your petitioners advanced for and loaned to said plaintiff a portion of the purchase price of said stocks and held the same as security for said loans and advances, charging interest thereon, and that the relation of pledgor and pledgee existed between said plaintiff and your petitioners; that your petitioners claim and specially set up and claimed as aforesaid that said provision of the constitution of the State of California interferes with the freedom and liberty of contract, and your petitioners now claim and specially set up that the construction of said contract between the parties herein by said supreme court of the State of California whereby it holds that said contract was a contract for the sale of stock on margin is an impairment of the obligation of a contract, and that such construction is repugnant to section 10 of article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Your petitioners further claim and specially set up and claimed in their reply brief that said provision of the constitution of the State of California is beyond the police power of the State of California, inasmuch as said provision is not confined to mere gambling contracts or contracts for the payment of differences, but prohibits legitimate business transactions.

Your petitioners further represent that there was no claim or pretense made and no evidence attempted to be offered tending
70 to show that the contract between the parties in said action was evasive or was intended as a cover for gambling or margin transactions or that it was otherwise than a *bona fide* contract between the parties, and your petitioners represent that it appears from the record in said action, without contradiction or denial, that said contract was an actual, *bona fide* contract, and that the transactions had thereunder were actual and *bona fide* transactions.

XXI.

Your petitioners present herewith a copy of the record on appeal to the supreme court of the State of California in said action and hereby refer to and make the same a part of this petition.

Your petitioners further represent that the chief justice of the supreme court of the State of California dissented from the order of said supreme court denying a hearing of this action in bank and filed a dissenting opinion, wherein he stated that the said judgment, in his opinion, is not sustained by the findings, and that it is nowhere found that the transactions in question were sales of stock on margin or for future delivery, nor that the special facts found necessarily imply such sales.

Wherefore your petitioners respectfully pray that a writ of error

be granted to the supreme court of the State of California, pursuant to the law and practice in that behalf.

JOS. MARKS,
HERMANN ZADIG,
JOSEPH WOLLBERG,
Petitioners.
EDMUND TAUSZKY,
Attorney for Petitioners.

Dated San Francisco, California, January 10th, 1895.

71 [Endorsed:] No. 15652. Ida B. Baldwin, plaintiff, *vs.* Hermann Zadig *et al.*, defendants. Petition for writ of error to the supreme court of California. Filed Jan'y 15th, 1895. T. H. Ward, clerk, by J. J. Duncan, deputy. Edmund Tauszky, attorney for petitioners, Nevada block, San Francisco.

72 In the Supreme Court of the State of California.

IDA B. BALDWIN, Plaintiff,
vs.
HERMANN ZADIG *et al.*, Copartners under the Firm Name of Zadig, Wollberg & Company, Defendants. } No. 15652.

Assignment of Errors.

On this tenth day of January, 1895, came Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, by Edmund Tauszky, their attorney, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit, by the record aforesaid it appears that the judgment given and entered in the said suit against the said defendants and in favor of the said plaintiff should have been given for the said defendants and against the said plaintiff for the following reasons:

I.

That section 26 of article IV of the constitution of the State of California, upon which the said suit is based, is repugnant to section 1 of the fourteenth amendment of the Constitution of the United States.

II.

That said section 26 of article IV of the constitution of the State of California is repugnant to section 8 of article one of the Constitution of the United States.

73 III.

That there was no contract between the parties to said suit for the sale of stock on margin or to be delivered at a future day, and the decision by the said supreme court of the State of California, wherein it held that the contracts between the said parties consti-

tuted contracts for the sale of stocks on margin, is an impairment of the obligation of a contract and repugnant to section 10 of article one of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Wherefore the said Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, pray that the judgment and decision of the said supreme court of the State of California and of the superior court of the city and county of San Francisco be reversed.

EDMUND TAUSZKY,
Attorney for Zadig, Wollberg & Company, Plaintiffs in Error.

[Endorsed:] No. 15652. Supreme court, State of California. Ida B. Baldwin, plaintiff, *vs.* Hermann Zadig *et al.*, copartners as Zadig, Wollberg & Co., defendants. Assignment of errors. Filed Jan'y 15th, 1895. T. H. Ward, clerk, by J. J. Duncan, deputy.

74 Know all men by these presents that we, Hermann Zadig, Joseph Wollberg, and Joseph Marks, as principals, and L. P. Drexler and John Landers, as sureties, are held and firmly bound unto Ida B. Baldwin in the full and just sum of twelve hundred dollars, to be paid to the said Ida B. Baldwin, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, in the supreme court of the State of California, in the suit pending in said court between the said Ida B. Baldwin, plaintiff, and said Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, defendants, a judgment was rendered against the said defendants and in favor of said plaintiff, and the said defendants having obtained from the chief justice of said supreme court of the State of California a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said Ida B. Baldwin, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, within sixty days from the date thereof:

Now, the condition of the above obligation is such that if
75 the said Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HERMANN ZADIG.
JOS. MARKS.
JOSEPH WOLLBERG.
JOHN LANDERS.
L. P. DREXLER.

Acknowledged before me the day and year first above written.

[SEAL.] GEO. T. KNOX,
Notary Public.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

L. P. Drexler and John Landers, the sureties named in the foregoing bond, being duly sworn each for himself, deposes and says that he is a householder in said State of California and is worth the sum of twelve hundred dollars, exclusive of property exempt from execution, over and above all debts and liabilities.

L. P. DREXLER.
JOHN LANDERS.

Subscribed and sworn to before me this 14th day of January, 1895.

[SEAL.] GEO. T. KNOX,
Notary Public.

76 [Endorsed:] No. 15652. Supreme Court of the United States. Hermann Zadig *et al.*, plaintiffs in error, *vs.* Ida B. Baldwin, defendant in error. Copy bond on writ of error. Form of bond and sufficiency of sureties approved. W. H. Beatty, chief justice of the supreme court of California. Jan. 15, '95. Endorsed: Filed Jan'y 15th, 1895. T. H. Ward, clerk, by J. J. Duncan, deputy.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of California, before you or some of you, being the highest court of the said State of California in which a decision could be had in the action between Ida B. Baldwin, plaintiff, and Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, defendants, wherein was drawn in question the validity of a provision of the constitution of the State of California, on the ground of its being repugnant to the Constitution of the United States, and the decision of said supreme court of the State of California was in favor of the validity of said provision of the constitution of the State of California, a manifest error hath happened, to the great damage of the said Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, to-
78 gether with this writ, so that you have the same at the city of Washington, in the District of Columbia, on Monday, the fourth day of March next, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States
for the Northern District of California,
in the Ninth Circuit,
By W. B. BRAIZLEY,
Deputy Clerk.

Allowed by—
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Jan'y 15th, 1895.

79 [Endorsed:] No. 15652. Supreme Court of the United States. Hermann Zadig *et al.*, plaintiffs in error, *vs.* Ida B. Baldwin, defendant in error. Writ of error. Filed *filed* Jan'y 15th, 1895. T. H. Ward, clerk, by J. J. Duncan, deputy.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ida B. Baldwin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Hermann Zadig, Joseph Wollberg, and Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Beatty, chief justice of the supreme court of the State of California, this 15th day of January, A. D. 1895.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

81 [Endorsed:] 15652. Supreme Court of the United States. Hermann Zadig *et al.*, plaintiffs in error, *vs.* Ida B. Baldwin,

defendant in error. Citation. Filed *filed* Jan. 16th, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

Receipt of the within citation is hereby admitted this 15th day of January, 1895.

VAN NESS & REDMAN,
Attorneys for Defendant in Error.

82 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing are full, true, and correct copies of the transcript on appeal, subdivision VIII, of closing brief on behalf of appellants, stipulations and orders extending time, opinion of the court, dissenting opinion of the chief justice on petition for hearing in bank, register entries, entries in the minutes of the court, petition for writ of error, assignment of errors, and bond on writ of error in the case of Ida B. Baldwin, plaintiff and respondent, *vs.* Hermann Zadig *et al.*, copartners under the firm name of Zadig, Wollberg & Company, defendants and appellants, now on file and of record in my office; also original writ of error and citation, filed in my office respectively on January 15th and 16th, 1895.

I further certify that on the 15th day of January, 1895, the said defendants and appellants lodged in my office a copy of said writ of error for said plaintiff and respondent.

I further certify that it is and was during the entire year 1894 provided by the rules of said supreme court that appellants shall file with the clerk their printed points and authorities within thirty days after the filing of the transcript on appeal, and that respondents shall file their printed points and authorities within thirty days after the service of appellants' points and authorities, and that within ten days after service of respondent's points appellants
83 may file a reply, and that the time for filing points and authorities may be extended upon stipulation of the parties by order of the court, but for not more than twenty days.

In testimony whereof I have hereunto set my hand and the seal of said supreme court this second day of February, 1895.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By R. A. MARSHALL, *Deputy.*

[Endorsed:] In the Supreme Court of the United States. Hermann Zadig *et al.*, plaintiffs in error, *vs.* Ida B. Baldwin, defendant in error. Transcript of record. T. H. Ward. R. A. Marshall.

Endorsed on cover: Case No. 15,788. California supreme court. Term No., 904. Herman Zadig, Joseph Wollberg, & Joseph Marks, copartners under the firm name of Zadig, Wollberg & Company, plaintiffs in error, *vs.* Ida B. Baldwin. Filed February 12th, 1895.

Supreme Court, U. S.
JAN 15 1897
JAMES H. McKENNEY,
CLERK.

No. 15,788.

166-483

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896. No. 222.

HERMANN ZADIG ET AL., Copartners, under the Firm Name of ZADIG, WOLLBERG & CO.,

Plaintiffs in Error,

vs.

IDA B. BALDWIN,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

EDMUND TAUSZKY,

Attorney for Plaintiffs in Error.

Filed this ..... day of January, 1897.

JAS. H. MCKENNEY, *Clerk.*

By .....

Deputy Clerk

PRESS OF H. S. CROCKER COMPANY, SAN FRANCISCO.

IN THE

Supreme Court of the United States.

HERMANN ZADIG ET AL., COPARTNERS UNDER THE FIRM NAME OF ZADIG, WOLLBERG, & COMPANY,

Plaintiffs in Error,

vs.

IDA B. BALDWIN,

Defendant in Error.

Brief on Behalf of Plaintiffs in Error.

STATEMENT OF THE CASE.

This cause comes to this court upon writ of error to the Supreme Court of California, allowed by the Chief Justice of that court (Tr., p. 41), upon petition of the plaintiffs in error, the defendants in said cause (Tr., p. 31).

The action was commenced on December 31, 1892, in the Superior Court of the City and County of San Francisco, by Ida B. Baldwin against Hermann Zadig, Joseph Wollberg and Joseph Marks, copartners, doing business under the firm name of Zadig, Wollberg & Co. (Tr., p. 1).

The complaint was, in form, to recover money ($595) had and received by defendants to and for the use and benefit of plaintiff (Tr., p. 1).

The action was, in fact, however, brought to recover said sum upon the claim that it was paid by defendant in error to plaintiffs in error upon contracts for the sale of shares of the capital stock of corporations, on margin or to be delivered at a future day.

The action was brought by virtue of a provision of the Constitution of California contained in Section 26 of Article IV thereof. This provision is as follows:

"All contracts for the sale of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any court of competent jurisdiction."

Except for this provision, there would be no right of recovery in the defendant in error (Baldwin vs. Zadig, 104 Cal., p. 594). It is self-executing, needing no act of the Legislature to give it its intended effect (Sheehy vs. Shinn, 103 Cal., 325).

The period covered by the transactions between the parties here was between March 3d and December 21st, 1892. These transactions involved in all two hundred shares of the stock of the Consolidated California and Virginia Mining Company and fifty shares of the stock of the Chollar Mining Company.

All the transactions were had under and pursuant to contracts in writing identical in terms, entered into between the parties in each instance.

These contracts are set forth in the printed record on pages 4, 5 and 6, and again on pages 13, 14 and 15, and once more on pages 33 and 34. Each contract consists of two parts. In the first, Zadig, Wollberg & Co. state explicitly the terms and conditions upon which they do business; in the second, Miss Baldwin agrees thereto.

These terms and conditions are as follows:

First. Zadig, Wollberg & Co. act as agents and brokers in the purchase and sale, for cash only, of stocks for their principals, in all cases making and accepting full cash payment only, on purchases and sales.

Second. They charge a commission for their services.

Third. They loan money on stocks, charging interest on any money so loaned.

Fourth. All such loans are made with the distinct understanding that all stocks upon which they are made are and shall be and remain the property of the person to whom the loan is made, subject only to the interest of Zadig, Wollberg & Co. therein as pledgees, and such pledged stock shall be deposited by the owner thereof with them or delivered to them on his behalf, and shall be held by them in pledge and as collateral security for the repayment of any moneys loaned thereon by them, and of any commissions or interest due to them, and of any money otherwise owing to them while they hold the same.

Fifth. The contract further provides how and under what circumstances the stock may be sold and how the proceeds shall be applied.

Sixth. Zadig, Wollberg & Co. shall not be obliged or required to keep on hand the identical certificates of stock purchased or pledged, but it shall meet all obligations and requirements on their part if they shall have the same number of shares of the same stock to surrender to the owner when redeemable or properly deliverable and properly demanded.

Seventh. Zadig, Wollberg & Co. engage and agree to hold themselves in readiness and to be able at all times to deliver to any and all owners all stocks purchased by them as agents and brokers, or deposited with them as collateral security, upon payment to them of the indebtedness thereby secured or due thereon.

Miss Baldwin's agreement is as follows:

First. She agrees to the above terms and conditions, and subject thereto appoints defendants as her agents and brokers for the purchase and sale of stocks for her and on her account, and at her risk and expense, as per her orders.

Second. It is expressly understood that Zadig, Wollberg & Co. shall not share in any profits or losses arising from purchases and sales of stocks made by them on plaintiff's account, and that they shall have no interest in any such stocks other than as pledgees.

Third. As part of each contract, there is at the end thereof and over Miss Baldwin's signature an order in the following words: "Subject to all of the foregoing terms and conditions, I hereby authorize and request you (the order is addressed to Zadig, Wollberg & Co.) as my agents and brokers, for me as your principal, and for my account and risk and at my expense, to" buy or sell as the case may be.

Plaintiffs in error were stockbrokers in San Francisco. On March 3, 1892, defendant in error gave them an order to buy for her twenty-five shares of the capital stock of the Consolidated California and Virginia Mining Company, and at the same time handed them $50.00. They purchased the stock accordingly on the same day in the stock board from Ives & Co., at $4.20 per share, and on the following day the stock was delivered to them, and they then paid Ives & Co. the amount of the purchase price,

$105. The commission of plaintiff's in error was $1.00. On the same day, the 4th, Miss Baldwin gave plaintiffs in error $50.00 additional, so that the account then stood as follows: She was charged with $106, and credited with $100, and Zadig, Wollberg & Co. held the stock as security (Tr., pp. 10, 12, and 16).

Miss Baldwin's next order was given on the 7th, and was to buy twenty-five shares of the Consolidated California and Virginia stock additional. She made no payment at this time. Zadig, Wollberg & Co. bought the stock at $4.50 per share from George W. Kelly, and received it from him and paid him $112.50 for it on the 8th. The commission on this purchase was $1.00. The account then stood as follows: Miss Baldwin was in the aggregate charged with $219.50 and credited with $100.00, and Zadig, Wollberg & Co. held the fifty shares as security for the difference (Tr., pp. 10, 14, and 17).

On the 11th Miss Baldwin gave Zadig, Wollberg & Co. $60, thus reducing her indebtedness to $59.50 (Tr., pp. 10 and 14). On the 21st she ordered them to sell the 50 shares; they did so at $4.90 per share, realizing $245.00 thereon. Their commission on the sale was $1.25: after crediting her with the proceeds and charging her with this commission there was a balance in her favor of $184.25, which was her net profit on the two transactions. She did not see fit to ask for the money, but on the 23d gave them $50.00 additional, which made the balance to her credit $234.25; at the same time she also gave them an order to buy 50 Chollar and 50 Consolidated California and Virginia for her; they did so, receiving the stock and paying for it as before. The total purchase price of the two stocks was $330.00, and their commission was $2.30. This brought Miss Baldwin in Zadig, Wollberg & Co.'s debt $98.05. On April 5th she gave them an order to buy 100 Consolidated California and Virginia additional for her. They did so in the same manner, at a cost of $500.00, and their commission was $2.50. On March 31st she had been charged with $1.05 interest, so on April 6th she owed them $601.60, and they held 150 shares of Consolidated California and Virginia and 50 shares of Chollar as security. On April 9th she paid them $150.00, and on the 14th $50.00, and these payments reduced her indebtedness to $401.60. At the end of April and May she was charged with interest aggregating $12.00, thus increasing her indebtedness to $413.60.

On June 18th she made a further payment of $40, thus reducing her indebtedness to $373.60, and on June 28th Zadig, Wollberg & Co. paid for her an assessment of $25.00 on the 50 Chollar, and on June 30th she was charged with $6.05 interest, thus increasing her indebtedness to $404.65. There were

no further purchases, but various interest charges and three additional payments. The payments were as follows: One of $50.00 on July 30th; another of $50.00 on October 24th, and the last of $40.00 on December 12th. Between June 30th and December 1st the additional interest charges aggregated $28.05. These debits and credits left Miss Baldwin's indebtedness to Zadig, Wollberg & Co., on December 13th, $292.70 (Tr., pp. 10, 14 and 15).

This being the state of the account, and Miss Baldwin making no further payments and the stock declining rapidly, Zadig, Wollberg & Co., pursuant to the authority given them in the contract, sold the 150 shares of Consolidated California and Virginia on December 14th for $1.80 per share, realizing thereon $270.00, which sum was credited to her, and she was charged with $1.35 commission on the sale. This left her in their debt, on December 14th, $24.05, with 50 shares of Chollar on hand as security (Tr., p. 10; Plaintiff's Ex. 4, p. 11).

For the same reasons, and pursuant to the same authority, plaintiffs in error sold the 50 shares of Chollar on December 20th for fifty-five cents per share, realizing $27.50 therefor, which was credited to Miss Baldwin's account. She was charged with $1.00 commission on the sale and $2.40 interest, and this left five cents to her credit, and on December 21st the account was balanced accordingly (Tr., p. 10; Plaintiff's Ex. 6, p. 12).

Plaintiff had a passbook in which all the items were entered except those in relation to the transactions of December 21st, viz, the sale of the 50 Chollar, and the final interest and commission charges (Tr., p. 10).

The Superior Court erroneously found that the account was as stated in the passbook, and thus from the findings it appears that there is a debit balance against Miss Baldwin of $24.05 (Tr., p. 7); but, as has been seen, there were five cents to her credit when the account was closed (Tr., p. 10). We draw attention to this circumstance, so that there may be no mistake about the fact, that before the commencement of this action the transactions between the parties were entirely closed and the contracts fully executed.

There was but one witness in the case, so there can be no controversy about the facts. This witness was a nephew of one of the members of the firm of Zadig, Wollberg & Co., who was in Europe, and he represented him in the firm during his absence. He testified as follows: "We at all times had the stock we purchased for plaintiff in our possession, so as to be able to deliver it to her at any time she demanded it.

"When we purchased stocks, the numbers of the certificates delivered to us were stated on the tags given us by the brokers. All certificates of stock are numbered, and we were able at all times to trace the particular certificates of each customer by the number that was on them and the tag of the broker from whom we bought them. So far as we were concerned, these purchases and sales of stock by us for plaintiff were actual and *bona fide* transactions in each instance. There was no dealing in differences between us, without an actual delivery of the stock. The stock was bought and delivered to us and paid for, and held subject to plaintiff's order at all times, by the payment of the balance due, and always in our possession for that purpose" (Tr., pp. 17 and 18).

"We were buying and selling stocks for different people, and the stocks that were bought went into our wallet and stocks sold came out of it, without regard to whose particular shares they were; but we had on hand at all times the full number of shares belonging to our customers, so that if plaintiff and all our other customers at any time wanted to take their stock we had sufficient stock on hand to deliver to plaintiff certificates for all the stock we purchased for her, on payment of what might be due us, and it was in our hands for that purpose. We never sold short, and never took orders of that sort, and had sufficient stocks on hand, at all times, to meet any demand made on us by our customers, and to comply with all demands of all our customers" (Tr., p. 18).

The witness further testified as follows: "We have no rule in our office that a deposit required of customers shall be of a given percentage of the purchase price. It depends on who the customers are. If they are parties who we know to be responsible, and who we know will pay for the stocks either to-day or to-morrow, or from whom we can get the money at any time, we demand a small deposit or perhaps none at all. Others whom we do not trust, we demand 80% sometimes. The general rule is 40 or 50%, just as the case may be. We have no specified amount. We do not buy for any who come in—only those we decide on as customers. We have not now any customers from whom we demand a deposit as high as 80%. I remember cases in which we have demanded as high as 80% by way of deposit, but I cannot specify them. The usual amount demanded from customers with whom we are willing to deal is, say, 40%, and as long as they keep a deposit in our hands which is equal to 40% of the then selling price of the stock, we are willing to carry the stock and we charge interest" (Tr., pp. 19 and 20).

The form of this action being simply for money had and received, and there being nothing in the complaint to indicate that defendant in error sought to recover money paid on margin contracts, there was no opportunity to set forth in the answer that the provision of the State Constitution contravenes the Constitution of the United States.

Plaintiffs in error, in their answer, denied that they were indebted to the defendant in error, and that answer put in issue the right of recovery on the part of the defendant in error.

The action was tried in the Superior Court of San Francisco, on April 24, 1893, and judgment was rendered for defendant in error on August 21st of the same year. In due time plaintiffs in error moved for a new trial, upon the grounds that the evidence is insufficient to justify the judgment, and that said judgment is against law. A statement of the case was prepared on this motion, in which it was specified as error, among others, that there is no evidence or law to sustain the findings or conclusion that defendant in error is entitled to judgment. This motion was denied, and an appeal taken from the judgment and from the order denying a new trial, to the Supreme Court of the State.

The Supreme Court of California consists of a Chief Justice and six Associate Justices. The court may sit in department and in bank. There are two departments, to each of which three Associate Justices are assigned, and each department has power to hear and determine causes.

After judgment pronounced by a department, the Chief Justice, with the concurrence of two Associate Justices, may order the cause heard in bank. If not ordered heard in bank within thirty days after it is pronounced, the judgment of the department is final (Sec. 2, Art. VI, Constitution of California). This cause was heard in department.

Under the rules of the court, appellants must file with the clerk their points and authorities within a specified time, and thereafter respondents may file their points and authorities, and finally appellants may file a reply. (Tr., pp. 36 and 43.)

In the reply brief herein plaintiffs in error claimed that the provision of the Constitution of the State of California upon which this action is based contravenes the Constitution of the United States, and they specially set up and claimed in said reply brief, that in making void, contracts for the sale of stock of corporations or associations on margin or to be delivered at a future day, the State Constitution contravenes Section 1 of the fourteenth amendment to the United States Constitution in

abridging the privileges and immunities of citizens of the United States, and depriving persons of liberty and property without due process of law, and denying to persons making such contracts the equal protection of the laws, and also that said constitutional provision interferes with interstate commerce and is in contravention of Section 8 of Article I of the United States Constitution (Tr., pp. 26, 28 and 36).

In the oral argument of said appeals, plaintiffs in error again specially set up and claimed that said provision of the Constitution of the State of California contravenes the Constitution of the United States, and pointed out the particular provisions of the Constitution of the United States which were relied upon, which were the same as those set forth in said reply brief (Tr., p. 36).

The department affirmed the judgment and order, and, in its opinion, did not directly pass upon the validity of said provision of the Constitution of California, but could not have reached its conclusion adverse to plaintiffs in error, without holding that said provision is not repugnant to the Constitution of the United States; and the adjudication of such question of repugnancy was necessarily involved in the disposition of said appeals by said Supreme Court of California (Tr., p. 37).

After judgment pronounced by the department, a petition for hearing in bank was filed in this case and denied (Tr., p. 31), but the Chief Justice dissented from the order denying a hearing in bank, and, in doing so, said: "The judgment in my opinion is not sustained by the findings. It is nowhere found that the transactions in question were sales of stock on margin or for future delivery, nor do the special facts found necessarily imply such sales. That the evidence would have sustained such a finding may be true, but that is not sufficient. This Court cannot take evidence—however conclusive—in place of a finding necessary to sustain the judgment" (Tr., p. 29; 104 Cal., p. 595).

Plaintiffs in error then sued out this writ of error, upon the ground that there was drawn in question in said action the validity of a provision of the Constitution of the State of California on the ground of its being repugnant to the Constitution of the United States, and that the decision of the Supreme Court of California, which decision was the final judgment of the highest court of said State, was in favor of the validity of said provision of the Constitution of California (Tr., p. 37).

ERRORS RELIED UPON.

The errors relied upon in this court, are:

That Section 26, of Article IV, of the Constitution of the State of California, upon which this suit is based, is repugnant to Section 1, of the XIVth amendment to the Constitution of the United States.

The particular portions of said section which it is claimed are violated by the State are those to the effect that no State shall deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTION OF THIS COURT.

As it is the practice for this Court to satisfy itself that it has jurisdiction, before entering upon a consideration of the merits of a question presented to it for decision, we will briefly advert to a few of its decisions in order to demonstrate that this cause is properly before it.

In Kaukauna Co. vs. Green Bay etc. Canal Co., 142 U. S. 269, this Court said: "Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the defendant company, without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State Court (Wilson vs. Blackbird Creek Marsh Co., 2 Pet., 245; Armstrong vs. Athens County, 16 Pet., 281; Chicago Life Insurance Company vs. Needles, 113 U. S., 574; Eureka Lake Co. vs. Yuba County, 116 U. S., 410)"

In Roby vs. Colehour, 146 U. S., p. 159, this Court said: "This question is a close one. But although it does not appear from the opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court formally passed upon any question of a Federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him, in the pleadings and proof, under the proceedings in bankruptcy to which

reference has been made. We must not be understood as holding that the certificate from the Chief Justice of the latter court is, in itself, and without reference to the record, sufficient to confer jurisdiction upon this Court to re-examine the judgment below. Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment (Parmelee vs. Lawrence, 11 Wall., 36, 38; Brown vs. Atwell, Administrator, 92 U. S., 327, 329; Gross vs. United States Mortgage Co., 108 U. S., 477, 485; Felix vs. Scharnweber, 125 U. S., 54, 59). The present case may be held to come within this rule. In view of the certificate by the Chief Justice of the State court, the office of which, as said in Parmelee vs. Lawrence, was, as respects the Federal question, 'to make more certain and specific what is too general and indefinite in the record,' we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate states were claimed by Roby, but were withheld from him by the court below."

In Scott vs. McNeal, 154 U. S., 34, the Federal question was raised for the first time in the Supreme Court of the State, and this court entertained jurisdiction.

See, also, Arrowsmith vs. Harmoning, 118 U. S., 194.

In Morrison vs. Watson, 154 U. S., 115, this Court said: "In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege, or immunity claimed under the Constitution, or a treaty, or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; *or, if it was not claimed in any form before judgment in the highest court of the State*, it cannot be asserted in this court. (Rev. Stat., Sec. 709; Spies vs. Illinois, 123 U. S., 131, 181; Brooks vs. Missouri, 124 U. S., 394; Chappell vs. Bradshaw, 128 U. S., 132, 134; Brown vs. Massachusetts, 144 U. S., 573; Schuyler National Bank vs. Bollong, 150 U. S., 85; Miller vs. Texas, 153 U. S., 535)."

These authorities clearly establish the proposition that this court has jurisdiction in the case at bar, the rights of plaintiffs in error having been set up and claimed in the Supreme Court of California.

The provision of the State Constitution deprives persons of liberty and property without due process of law, and, as construed and applied by the Supreme Court of California, amounts to a denial to stockbrokers of the equal protection of the laws.

Five years after this provision went into effect the Court was first called upon to construe it, in the case of Kutz vs. Fleisher, 67 Cal., p. 93.

That was an action by a stockbroker against a customer to recover a balance due for advances.

The Supreme Court of California said: "It was not a case of a sale of personal property by a vendor to a vendee, but of a broker (plaintiff) purchasing and selling stocks for account of another (defendant), advancing money for the purpose, and paying assessments on the stocks purchased. The whole transaction was had under an agreement entered into in advance of the purchases being made. It was no part of the terms of the agreement that it was not to be performed within one year from the making thereof. On the foregoing facts, it follows that Section 26 of Article IV of the Constitution; Section 1624, Subdivisions 1 and 4, of the Civil Code; Section 1973, Subdivisions 1 and 4, of the Code of Civil Procedure, have no application in this case." (The provisions of the Codes referred to by the Court constitute the Statute of Frauds.)

The opinion closed with the statement that, "The Court committed no error in refusing the requests for instructions prepared by counsel for defendant. They referred to matters not in the case."

One of these instructions was as follows: "If the jury believe that since January 1, 1880, the defendant has paid plaintiff any moneys on account of stock transactions or purchases made to be delivered at a future day, or on a margin, or not delivered at the time of such transactions, the jury must find for defendant and against plaintiff for the amount of such payments" (Transcript on Appeal, Kutz vs. Fleisher, page 31, No. 8715, Supreme Court of California). (The record is accessible to Counsel for defendant in error, and shows (page 26) that payments were made to plaintiff by defendant on account of the transactions involved, subsequent to January 1, 1880).

For six years thereafter Kutz vs. Fleisher remained the law of the State.

In 1891 the Supreme Court was again called upon to construe this provision in the case of Cashman vs. Root, 89 Cal., p. 373.

The facts in that case, as stated in the opinion, were as follows:

One Hooker was a stockbroker in San Francisco, and Root was in his employ. Cashman dealt in mining stocks and employed Hooker as his broker, and also requested Hooker to make advances for him on his purchases. Cashman conveyed certain real estate to Root in trust as security for his indebtedness to Hooker. Subsequently Cashman brought this action to compel a reconveyance, alleging that he was not indebted to Hooker; the latter however claimed that Cashman was indebted to him, and that, until that indebtedness was paid he was not entitled to a recovery. Cashman did not dispute the correctness of the account according to the course of dealing between the parties or their understanding at the time, but claimed that this alleged indebtedness was void under the provision of the Constitution here involved.

Hooker contended that the relation of vendor and vendee did not exist between him and Cashman; that they neither bought nor sold stock from or to each other; that Hooker, as agent for Cashman, purchased and paid for the stock, receiving immediate delivery for Cashman, and thereafter holding it subject to his order upon the payment of the price and commissions, and that the further contract by which he held it as security for a loan constituted the relation of pledgor and pledgee, which is not prohibited by the Constitution.

"This view was adopted by the learned Judge of the Trial Court, and the findings are carefully drawn upon that theory. They find that the stock was purchased by Hooker as agent of and belonged to plaintiff, and that Hooker never sold stock to or bought from plaintiff" (89 Cal., p. 380). Yet in the face of these findings of fact on the part of the trial Judge—findings as to what was the contract and the transactions thereunder between the parties—the Court decided adversely to Hooker and reversed the judgment; thus, contrary to a long-established practice, the findings of the trial Judge were utterly disregarded and entirely brushed aside, and a decision reached making a contract contrary to the understanding of the parties themselves. The Court said that it is not easy to characterize by a name the relation between the broker and his customer, and that for all *ordinary* purposes it may be admitted that the broker purchases as the agent of his customer and then holds the stock

as a pledge to secure a debt (p. 383). But this was not an ordinary purpose.

The Court further said: "It is a matter of public history that the constitutional provision was adopted just after a period of remarkable stock speculation in which a large part of the community had been set wild with the apparent prospect of great gain, and the rapid fluctuations of stock afforded unusual inducement to stock gambling. By skillful manipulation of the markets, a few fortunate ones had been able to take advantage of the existing *mania* and make large fortunes for themselves, at the cost of widespread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time through these very purchases on margin. Of these matters this Court will take judicial notice, and, doing so, cannot doubt that this inhibition was intended to strike down this practice.

"If it does not do this, it simply beats the air. Although an isolated case or two might occur, where a transaction directly between vendor and vendee is upon like terms, certainly we know there was no practice of that kind which could have been regarded as an evil of sufficient importance to be prohibited in the fundamental law.

"Such a prohibition is of little worth if it can be evaded by so simple a device. A party wishing to purchase on margins has but to interpose his broker, who is to carry the stock, instead of the original owner. This would not diminish the evil. In fact, it is the very form of the evil mainly intended to be prohibited" (pp. 382–3).

The conclusion was then reached that, "if by the transaction the customer is enabled to do that which is prohibited, to wit, purchase stock on margin, it must be held to be within the prohibition, and if Hooker did not himself sell to plaintiff, but was only the instrument through whom the illegal end was accomplished, he being privy to the design, the same result would follow (Irwin vs. Williar, 110 U. S., 510). In the accomplishment of the unlawful purpose he took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam*. The end attained, and not the form of the transaction, must determine the question" (pp. 383–4).

The decision of this Court cited in support of this anomalous application of the doctrine of *per interpositam personam* in no sense sustains such application.

In that case the contract between the principals themselves was a gambling transaction and the broker was privy to the unlawful design of the parties and brought them together for the

very purpose of entering into an illegal agreement, and it was held by this Court that he was *particeps criminis* and cannot recover for services rendered or loss incurred on behalf of either in forwarding the transaction. Of course, if a broker aids two persons in making or carrying out an illegal contract with knowledge of its illegality and thus makes himself the instrument through whom the illegal end is accomplished, he cannot recover for his services or advances in the unlawful transaction; but, in order to make the broker *particeps criminis*, there must first have been an illegal transaction. According to the California decision itself, "stock ordered was always purchased by Hooker, paid for in full and delivered to him, except when he had orders to sell the same stock for another customer, in which case the stock was simply transferred from one account to the other at market rates. The account was generally balanced monthly, when, as Hooker testified, plaintiff could tell whether he had lost or won in stocks. Hooker did not keep the stock of his customer separate or preserve its identity, but always had under his control sufficient to satisfy the claims of his customers" (p. 379).

In passing, it may be remarked that it has long been the settled law of the State that the pledgor need not keep on hand or return to the pledgee the identical certificates of stock pledged.

Atkins vs. Gamble, 42 Cal., 86–99.
Thompson vs. Toland, 48 Cal., 99–116.

Recently approved in Craig vs. Hesperia Land and Water Co., 45 Pac. R., 10.

The Court conceded that there was no contract for the purchase or sale of stock on margin between Hooker and Cashman, but in effect held, without evidence, that the contract they did enter into was a device to evade the constitutional provision.

This provision was clearly construed by the highest court of the State so as to result in the impairment of the obligation of the contract between the parties, particularly as that contract was made while Kutz vs. Fleisher constituted the unquestioned law of the State.

Cashman vs. Root was followed, three years later, in Wetmore vs. Barrett, 103 Cal., 246, the Court saying that, as it is entirely satisfied with the conclusion there reached, it is not necessary to go over the matter again.

But a few days later it did "go over the matter again" by reconsidering the whole question in Sheehy vs. Shinn, 103 Cal., 325, and it there said again that it is entirely satisfied that the decision in Cashman vs. Root was right, and that it must

stand (p. 340), but yet there was an entire change of base. At the outset the Court, speaking through the Chief Justice, said that its decision "must depend wholly upon the proper construction of the findings of the Superior Court and of the Constitutional provision" (p. 328).

So while the findings of the Superior Court were entirely over-ridden in Cashman vs. Root, yet that decision was pronounced correct and adhered to in terms, although the Court returned to the long-established practice of giving consideration to the findings of the trial court, and said its decision must depend wholly upon their "proper construction."

It was then said that the Court must now decide, "as matter of law what the framers of the Constitution intended by the terms they have employed," and the Court accordingly proceeded to inquire what that intention was and said, "for this purpose the language of the Constitution is necessarily the first thing to be considered, and if its meaning is plain there is no occasion to resort to extraneous aids. With respect to the clause under consideration, it does not seem to be very obscure in its terms or intent. It declares that certain contracts shall be void, and that any money paid in pursuance of them may be recovered back by the party paying it in any court of competent jurisdiction. The provision is evidently self-executing, needing no act of the Legislature to give it its intended effect. Contracts of the class designated are rendered void by the Constitution itself, and money paid in pursuance of them is recoverable by actions commenced in the Superior or Justice's courts, according as the amount claimed is greater or less than $300.00. The only question of construction which can possibly arise is upon the meaning of the phrase 'on margin, or to be delivered at a future day,' but even as to this there is little difficulty so far as the present case is concerned. There are some transactions which are clearly and plainly within the designated class, although there are others with respect to which it may be doubtful whether they are included or not. The meaning of the word "margin," as ordinarily used in connection with stock sales, has long been well understood. As most frequently employed in this State at the time of, and for many years prior to, the adoption of the Constitution, it meant the sum deposited by a purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price upon condition that he should hold the stock as security for his advances, with the right to sell it in case of depreciation in value and failure of the purchaser to keep the margin good. This, we say, was the

sense in which the word was most frequently employed; but it was also employed to describe deposits made by sellers and purchasers of stock for future delivery upon a variety of conditions, and in various ways which need not be considered here. It is enough for all the purposes of this case to say that whenever the purchaser of stock paid to the vendor of the stock, or to his broker, a percentage of the purchase price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin" in the sense in which the term was used by the framers of the new Constitution. If the mere language of the instrument did not make this sufficiently manifest, it is made so by reference to the arguments of both the advocates and opponents of the provision in the constitutional convention (2 Debates on the Constitution, 806–810), and by the evidence in this record.

"This being so, it follows that an agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price, the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance, is a sale of stock on margin and for future delivery.

"That such was the agreement between the plaintiff and defendant in this case, and that he, the defendant, THOUGH NOMINALLY A MERE BROKER FOR THE PLAINTIFF, WAS IN REALITY HER VENDOR, is, in effect, the finding of the Superior Court as a conclusion, not of law, but of fact, and upon this fact the judgment is based. Unless, therefore, the more specific findings of fact are inconsistent with this general finding, the right of the plaintiff to recover the amount paid by her upon such margin sales cannot be denied" (pp. 329–30–31).

The Court then quotes the more material portions of the findings in full, and stress is again placed upon the circumstance that the trial court finds as a fact, in a general finding, that the transactions between the plaintiff and defendant were in substance and effect A SALE of stocks on margin and for future delivery, and it is decided that this general finding is not inconsistent with the more specific findings which precede it (p. 337). And the conclusion is reached, "THAT THE REAL TRANSACTIONS BETWEEN PLAINTIFF AND DEFENDANT WERE SALES ON MARGIN BY HIM TO HER," and that it makes no difference "that defendant actually bought the stock ordered, paid for it and received it for the account of the plaintiff," and that "it is quite consistent with a sale by him to her that he should do all these things"

(p. 338). "Nor is it inconsistent," said the Court, "with a sale from defendant to plaintiff that she intended to buy the stock which she ordered, and that he should buy it and hold it subject to her orders and his own rights under the contract, and that he had the same intention, and that he always kept on hand the requisite number of shares" (p. 339).

So, although Cashman vs. Root is right and must be adhered to, yet the doctrine of *per interpositam personam* is swept aside, and the parties are perforce held to have entered into a contract which neither of them ever intended to make, namely, a contract which constituted a sale by plaintiff to defendant.

The Court thus veered around and confined itself to the language of the Constitution which covered contracts for the sale of stock on margin or for future delivery, and in terms and in effect held that the relation of vendor and vendee, and not that of broker and customer, must exist between the parties.

In construing the contract between Sheehy and Shinn to be a contract of sale on margin from him to her, the Court actually made a contract for the parties which they never entered into, or intended entering into, and we refer this Court to the specific findings quoted at length in the opinion (p. 331 to 337) in support of this assertion.

It may be interesting to note that Mr. Justice McFarland, in expressing his concurrence, fitly characterized the constitutional provision in question as one "which allows a party to a contract to profit by it as long as it pays and to repudiate it by boldly ignoring his solemn obligations as soon as it begins to show loss" (p. 342).

The provision again came before the Court a few months later, in Macomber vs. Conradt, 37 Pac. Rep., p. 901, and the judgment was sustained on the authority of Cashman vs. Root, and Sheehy vs. Shinn, and it was held that "there is no conflict between said cases and Kutz vs. Fleisher."

Shortly after this the case of Kullman vs. Simmens, 104 Cal., 595, was decided. Here the Court felt it necessary to explain why the later cases are not in conflict with Kutz vs. Fleisher, and in doing so it said: "That action involved a series of transactions extending over several years, most of which were had prior to January 1, 1880, and the provisions of the present Constitution were, of course, inapplicable to them. In the account upon which the action was brought there were two purchases of stocks by the plaintiff for the defendant after that date, and the trial court was requested to hold, as a matter of law, that the mere fact that the plaintiff had purchased and paid for these stocks at the request of the defendant, and, instead of immedi-

ately delivering them, had retained them until he should be repaid the advances, was in violation of the statute of frauds, and in contravention of the provisions of Article IV, Section 26, of the Constitution. The trial court refused so to hold or rule, and this court affirmed its action, and held that the statute of frauds and the above provision of the Constitution had no application.

"Whether a transaction or a series of transactions between a broker and his customer for the purchase of stocks that are not immediately delivered, or of which an immediate delivery is not contemplated, is in contravention of the provision of the Constitution, is a question of fact to be determined in each particular case, and the circumstances under which the transaction is had, and the conduct of the parties in reference thereto, will naturally have great influence in determining this fact. Whether the transaction is a legitimate one or one which is within the inhibition of the Constitution, is to be determined by the actual course of dealing and the evident purpose of the parties to such transaction, rather than by what they may have termed it, or by the form in which it may have been entered in their books, and is to be determined by the trial court from the evidence before it; and the finding of the Court upon this question of fact is entitled to the same consideration upon an appeal as is any other finding of fact, and must be accepted here as conclusive, if there was any evidence in support of it" (pp. 599, 600).

The last decision in the series was the one in the case at bar, Baldwin vs. Zadig, 104 Cal., p. 594, and, in affirming the prior cases, the Court held that, "both of the parties to the transaction were in *pari delicto*, and, except for the provision of the Constitution, there would be no right of recovery in the plaintiff."

The latest utterance upon the subject on the part of our Supreme Court, however, was made in a celebrated case, entitled Fox vs. Hale & Norcross Silver Mining Company, 108 Cal., p. 385. In that case the question arose as to the control of the mining company on the part of certain of the defendants through the election of directors subservient to them, upon proxies given by stockbrokers in San Francisco, and, in this connection, the Court said:

"It seems that in 1887, and for some time prior thereto, the bulk of the Hale & Norcross stock was in the hands and under the control of certain stockbrokers in San Francisco. On the books of the company it stood in the names of trustees of these brokers, but, ACCORDING TO THEIR THEORY, IT WAS THE PROPERTY OF THEIR CUSTOMERS. The evidence in this record as to the exact relations between broker and customer

is not very explicit, but what they really were is a matter of common knowledge, with which this Court has been made especially familiar by a series of cases recently decided here, involving a construction of the constitutional provisions against sales on margin (Cashman vs. Root, 89 Cal., 373; 23 Am. St. Rep., 482; Wetmore vs. Barrett, 103 Cal., 246; Sheehy vs. Shinn, 103 Cal., 325; Baldwin vs. Zadig, 104 Cal., 594; Kullman vs. Simmens, 104 Cal., 595). I conclude, therefore, that this Hale & Norcross stock was held, as mining stocks were at that time generally held, by the San Francisco brokers. It had been purchased on orders from dealers and speculators upon deposit of the customary margin, and had been transferred to the trustees of the brokers as security for their advances. It was, in other words, ACCORDING TO THE THEORY OF THE BROKER'S CONTRACT, A PLEDGE, BUT, ACCORDING TO THE CONSTITUTION, IT WAS THE PROPERTY OF THE BROKER, AND THE SUBJECT OF AN UNLAWFUL AND VOID CONTRACT OF SALE.

The contract in the case at bar, in express and positive terms, negatives the idea that the title does not immediately pass to the customer; and, while it provides for the sale of the stock without previous demand or notice, whenever the security may be deemed insufficient, yet this waiver of demand and notice is authorized by the Civil Code of California, in Sections 3003 and 3004, and does not militate against the idea of a pledge as distinguished from an agreement of sale. It is part of the law of pledge that the pledgee must retain possession of the thing pledged (Sec. 2988, Cal. Civil Code), as well as that demand and notice may be waived; consequently the retention of the stock by the broker, and the waiver of demand and notice in case of sale does not affect the relation of pledgor or pledgee. Likewise the provision of the contract that the broker shall not be obliged to keep on hand the identical certificates of the stock pledged, is, as has been shown, nothing more than a mere declaration of what the law is, as settled by the Supreme Court of California, and the rights and obligations of the parties would be just the same if those statements were not in the contract.

The contract is fair upon its face, and there is absolutely no evidence to uphold the proposition that it is a device or in any way evasive.

In the absence of all evidence that it was the purpose or intention of either of the parties to violate or evade the constitutional provision, the contract should be construed as any other contract between competent parties.

The burden of showing that the contract is void rests upon the defendant in error. On its face it is legal, and it never is,

in the absence of proof, presumed that parties are engaged in a violation of the law. "Parties are to be given the widest latitude in making contracts with reference to their private interests, and the invalidity of such contracts is never to be inferred but must be clearly made to appear."

Herriman v. Menzies, 46 Pac. R., p. 730.

A transaction which, on its face, is legitimate, cannot be held void as a wagering contract by showing that one party only so understood or meant it to be. The defendant in error must go further and show that this understanding was mutual; that both parties so understood the transaction (Irwin v. Williar, 110 U. S., 507; Bibb v. Allen, 149 U. S., 492).

In the latter case, this Court said: "It is not questioned that if the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein or for advances and disbursements by him for his principal. The reason for this rule being that in such illegal transactions of which the agent has knowledge, he is regarded as *particeps criminis*, which precludes him from the recovery of either commissions or advances (Irwin v. Williar, 110 U. S., 499, 510). But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the Bill of Exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations" (Bibb v. Allen, 149 U. S., pp 490, 91).

See also, Armstrong v. Am. Exch. Bank, 133 U. S., 469.

Clarke v. Foss 7 Bissell, 540–52.
Bigelow v. Benedict, 70 N. Y., 202–4.
Williams v. Carr, 80 N. C., 298.
Section 3541, Cal. Civil Code.
Dewey on Contracts for Future Delivery and Commercial Wagers, p. 45 and p. 48.

The effect of the California decisions is ruinous to the business of stockbrokering in that State, and to the stockbrokers themselves. The calling of the stockbroker has existed for years, and is a legitimate one, and one necessary in our active and complex commercial life. However fair the general expressions of the California Court may sound, that each case depends upon its own facts, it cannot be gainsaid that the principles of decision announced by the Court as determinative of what consti-

tutes margin transactions, are subversive of well-recognized rules of law and principles of justice. The strongest kind of evidence that a broker did not sell stocks to his customer on margin or otherwise, is held in Sheehy v. Shinn, in the face of the intention of the parties, to support a finding that there was a sale on margin by the broker to his customer, and although, in the case at bar, the Chief Justice, who wrote the opinion in Sheehy v. Shinn, said that the judgment is not sustained by the findings and that it is nowhere found that the transactions in question were sales of stock on margin or for future delivery, and that the special facts found do not necessarily imply such sales, yet the judgment is permitted to stand. We earnestly submit that it appears from these cases that the rule of decision laid down by the Court amounts to an application of the constitutional provision in a manner not warranted by the language of the Constitution itself, and so as to deny to brokers the equal protection of the laws which is guaranteed to all persons by the Constitution of the United States.

A few quotations from authorities from various States in the Union will illustrate this.

Markham v. Jaudon, 41 N.Y. 235, is the leading authority in this country upon the subject of the relations of the broker and his customer. There are numerous others to the same effect, and they all fully sustain the proposition that the broker is not a principal, and that there is no contract for sale or of sale between him and his customer.

In Williams vs. Carr, 80 N. C., 298–9, the Court said:

"The plaintiffs were not vendors but acted for the intestate in making purchases."

In Warren v. Hewitt, 45 Ga., 507–9, the Court said:

"The Judge in his charge to the jury, and in his judgment refusing a new trial, treated Warren, Lane & Co. as a principal party to the transaction and as selling cotton to Hewitt. This error is fundamental. The evidence shows that they only acted as his agents in effecting the purchase in Baltimore."

In Lehman v. Strassberger, 2 Wood, C. C., 562, the learned Judge said:

"Let it be conceded that contracts for the future delivery of cotton, when it is agreed that there shall be no delivery, but that differences shall be paid, are wagering contracts, and void as between the parties. That is not the case shown by the record here. The parties here are not parties to any contract for the sale or delivery of cotton. Lehman Brothers, as far as appears from the record, never at any time sold to or bought from Strassberger a pound of cotton. The parties with whom Strass-

berger contracted were persons other than Lehman Brothers, whose names are not disclosed. Lehman Brothers were only factors of Strassberger to make contracts with other parties. When, therefore, they sue Strassberger to recover money paid by them for him, on such contracts, and their compensation for their services, the Court is not called upon to enforce a contract against the law between the parties to that contract, but simply to enforce the collection of a note, the consideration of which is money advanced and services performed by agents for their principal.

"If Strassberger was suing the parties with whom he contracted, either to buy or sell cotton, for the difference between the contract and the market price, then the case would approach more nearly to what is forbidden by the New York Statute."

See also Whitesides v. Hunt, 97 Ind., 191.
Durant v. Burt, 98 Mass., 161.
Sawyer v. Taggart, 14 Bush (Ky.), 727.
Gregory v. Wendell, 39 Mich., 337.
Dos Passos on Stockbrokers and Stock Exchanges, pp. 103, 111, 112, and cases cited.

At pp. 410–11, Dos Passos says:

"There is a marked distinction in those cases which have arisen between the direct parties to a contract, as for instance, a vendor and a vendee, and those in which a broker, acting for a principal, has entered into agreements with third persons in behalf of his principal, and then seeks indemnity from the latter for money laid out, etc., and commissions in such transactions. In the former class, if the intention of the parties is not to deliver or receive property, but to settle by the mere payment of differences, the contract is a wager. But a broker may be ignorant of the unlawful intention of his principals, and may then recover for money paid out, commissions, etc., although the principals would be unable to enforce the contract as between themselves.

"This important distinction will be found to be supported in all of the well-considered cases."

In Brown v. Speyers, 20 Gratt, pp. 308–10, the Court said:

"It is objected, however, that the contract, which is the foundation of this action, is a mere wager, and void, as such, under the provisions of the Virginia Statutes. I cannot perceive the force of this objection. By the very terms of the arrangement, the defendant in error, in buying and selling the gold, could sustain no loss, nor realize any profit from the transaction

beyond his commissions, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the adventure. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it. And I have yet to see a case in which it has been held that a contract is a wager by the terms of which the loss and profit were all on one side.

"Another point relied upon in the argument is, that no sales and purchases of gold were in fact made; and the subject-matter of such pretended purchases and sales had, at the time, no existence, actual or potential; and therefore, according to a well-established principle of the law of sales, the contract in relation thereto was void in law. In support of this position several cases were cited, in which it has been held, that if goods are sold, to be delivered at a future day, and the vendor neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods he has contracted to deliver, he cannot maintain an action on such contract. Whether this principle be sound or not, it is unnecessary now to decide. It certainly has been repudiated by great judges, and is not regarded as law, according to the current of modern authorities. See 2 Parsons on Contracts, 543; Hibblewhite v. McMorine, 5. Exch. R., 462. This principle, however, can only apply to actions by the *vendor* against the *vendee* to recover damages for non-performance of the contract. It can have no application to a case in which an agency is established, and the agent is authorized to go into the market, purchase the goods, and sell them for the benefit of his principal. In such case, if the agent conforms to his instructions, and a loss is sustained from the transaction, it would seem to be too clear for argument, that the principal is bound to indemnify the agent for any loss he may sustain. As the agent is not permitted to reap any of the profits of his agency, he is entitled to be compensated for all expenditures and damage arising in the course of his employment.

"In regard to the assertion that no such purchases and sales of gold were in fact made, the defendant in error states that all the transactions mentioned in his account of gold bought and sold for the defendant were actual, *bona fide* transactions, with other parties; and there is no evidence in the record contradicting this statement."

We have seen that in Sheehy v. Shinn the Chief Justice of the California Supreme Court referred to the debates in the Constitutional Convention, and it may not be unprofitable to inquire

berger contracted were persons other than Lehman Brothers, whose names are not disclosed. Lehman Brothers were only factors of Strassberger to make contracts with other parties. When, therefore, they sue Strassberger to recover money paid by them for him, on such contracts, and their compensation for their services, the Court is not called upon to enforce a contract against the law between the parties to that contract, but simply to enforce the collection of a note, the consideration of which is money advanced and services performed by agents for their principal.

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beyond his commissions, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the adventure. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it. And I have yet to see a case in which it has been held that a contract is a wager by the terms of which the loss and profit were all on one side.

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We have seen that in Sheehy v. Shinn the Chief Justice of the California Supreme Court referred to the debates in the Constitutional Convention, and it may not be unprofitable to inquire

what the framers of the State Constitution had to say when they adopted the provision here in question.

First, it may be remarked that the present Constitution of California was ratified by 53.7-10% of the voters of that State, in May, 1879, and went into effect on January 1st, 1880. Article IV, of the Constitution is headed, "Legislative Department," and Section 26 of that Article is, in full, as follows:

"Sec. 26. The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery. The Legislature shall pass laws to regulate or prohibit the buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange, or stock market under the control of any association. All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any Court of competent jurisdiction."

When this Section came to be considered in Committee of the Whole of the Constitutional Convention, Mr. Samuel M. Wilson, an eminent member of the Convention and of the bar of San Francisco, moved to strike out the last clause, which is the one here in question, viz: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered, by the party paying it, by suit in any Court of competent jurisdiction."

Mr. Wilson spoke in support of his motion to strike out, and said, in relation to this clause:

"That is altogether too broad. It has been conceded heretofore in the debates in this Convention that corporations were necessary to conduct many of the great branches of business in this State. It is admitted by all that we cannot prosper without aggregated capital in the form of corporations. We have already passed some very strong provisions to regulate and control them, and the State and the Legislature has at all times the power to regulate and control them. If it be true that we intend to preserve corporations as a part of the great business machinery of the State, then there will be a large amount of capital stock that will always be necessarily owned by individuals. It embraces as has been shown here by the record, a number of branches of business—banks, insurance companies, shoe manufacturing companies, railroads, rolling mills, manufacturing companies, lumber companies, car-

riage factories, and all these various interests. Assuming that I should own in a large carriage company three or four hundred shares of its capital stock, why should I not be permitted to sell it part cash and part on time? Is there anything in the transaction inconsistent with the public morals? Is there any just reason why I should not sell my private stock? In an insurance company, why should I not sell my own shares of stock part cash and part on time? Yet, this section would prohibit as simple a business transaction as that. * * * It seems to me beyond the pale of contradiction, that if a man sells a hundred shares of his insurance stock for so much a share, half cash and half payable in thirty days, the Courts would declare the whole contract to be void, and the man who had voluntarily paid his first installment could recover at law. There are cases sometimes, where an administrator or executor may deem it expedient to sell part cash and part on time. A man dies possessed of a large amount of stock in one of these many companies; in order to close the estate satisfactorily, the executor finds it best to sell that stock part cash and part on time, and the Probate Judge approves of it as an expedient and proper course to be followed, and such a sale is made—a public sale to a bidder is had—the stock to be delivered at the last payment. It is really a contract of sale between private individuals, because the balance is to be paid at a certain time, at which time the stock is to be delivered; this is a contract of sale. But in such a case the contract of sale would be void, although made under the direction of the Court, because the Constitution prohibits any such sale where the property sold is to be delivered at a future day. Take the case of a partnership. Two men are engaged in business, and in the course of their business are unable to agree and must dissolve their connection. It becomes necessary to have a sale in the public market in order to close up their partnership affairs. They desire to sell. They agree to sell in the market at auction, and to divide the proceeds between themselves. In such a case they might deem it desirable to sell on time, or sell half cash and half on time. This Section prohibits that transaction. This disposition of the Convention to regulate or prohibit the private business of men, will be found to be wrong, and will not meet with the judgment of the great body of sensible voters of this State when they consider this Section. I do not see why it is necessary to forbid sales of stock to be delivered at a future day. The evident intention of the section, as the gentleman from Placer says, was aimed at sales in the stock board. But it goes further, and seems to have no limit. It reaches private sales and private transactions.

Then, too, it uses the words, 'on margin.' This would be a bad term to put in the Constitution. It is a technical phrase. If I understand a sale on margin, it is merely a sale of stock on time, the stock being retained as security, and not delivered until the final payment is made. This is what is generally called a sale on margin. If the stock falls in value before the time of final payment arrives, the buyer is called upon to advance more margin. At the end of the time the practical operation is, that instead of paying and taking the stock, they generally pay the difference between the value of the stock, at the time of the first transaction, and the value at the tine of the settlement. But here you do not aim solely at the stock board. You make it apply to a private transaction.

"The question will be whether, in the judgment of this Convention, it is good business policy. This is a question which addresses itself to the sound business sense of the Convention. How far shall we determine these matters instead of leaving them to the Legislature? In the first portion of the section it is left to the Legislature to determine when it will prevent abuses, but this last sentence goes to the extent of preventing an ordinary business transaction, against which no valid objection could be made in point of morals or expediency; and it also interferes with the private rules of business men in numerous instances, such as I have cited, of administrations, partners, and many other instances which might be given of a similar nature. The section, with the amendment I propose, would place it within the power of the Legislature to regulate or prohibit sales in the Stock Board as it might see fit, and would permit men to make their own private contracts, as they ordinarily do in business transactions, exercising their own judgment, and not calling upon the State to direct or regulate them." (Debates and Proceedings of Constitutional Convention of California, Vol. 2, p. 806.)

Mr. David S. Terry was the leader amongst those who opposed Mr. Wilson. The argument in favor of the provision was to the effect that these contracts are mere gambling contracts. Mr. Terry said: "Men do not buy stock. That is a mere pretense. The seller has got no stock in his possession; the buyer don't want any stock, and the seller knows it.

"The fact is, as I learn from those who have had dealings with these Boards, no stock is ever delivered or intended to be delivvered. If at the end of the time, say ten days, the stock has advanced in value, why he gets his check for the difference between that and the price he agreed to pay for it. If, on the contrary, the stock has declined in value, the purchaser must

pay the difference, and that is the end of it. But if this provision is adopted, as I think it will be, then no man can sell stock unless he has got it to sell, because he is required to deliver the stock at the time of the sale; and whether he chooses to sell for cash or not, he must have it and deliver it when he sells it. * * * This provision is not going to interfere with an honest sale by anybody of any honest stock that he may have. If an administrator makes a sale of stock, there is no reason why the stock should not be delivered. The party delivers other property when he sells, and takes security for the purchase money, and no harm can be done in that way. If a man has got the stock he can deliver it; if he has not got the stock, he has no right to sell it in a manner which simply means a bet upon the rise or fall. I say that no injury can be done to any honest man or any legitimate business, and the only effect will be to prevent these swindling sales of stock which the seller has not got and the purchaser does not want, and which is simply betting upon the rise or fall of that stock within a given number of days." (Ibid., pp. 807, 808.)

Mr. Wilson replied as follows: "The argument of the gentleman from San Joaquin, Mr. Terry, in support of the section, is impracticable. He seeks to remedy an evil, and, in proceeding to do so, he destroys the rights of innocent business men. There is just the trouble and the exact difficulty.

"While it cures the evil, it destroys more honest and regular business transactions, and it does greater injury to the public than the benefits which it confers. It prevents the sale of any shares of capital stock to any person to be delivered at a future day, and it does not reach the point to which he would address himself. If he intended to reach fictitious sales of stock he has been singularly unfortunate. I claim that this is destructive of business principles. It is a violation of the dictates of good common sense. It is interfering with the business of men who are capable of conducting their own affairs; and I am opposed to this convention acting as a wet nurse to individuals who are able to manage their own affairs; and I am opposed to declaring any transaction void after a man enters into it with his eyes open and is dealing according to his own judgment. It seems to interfere with the ordinary business transactions of life which are free from any immoral tendency. We had better delegate it to the Legislature. We had better understand now and at once what is the object and the meaning of a Constitutional Convention. The Legislature, after all, is a branch of the general government, and we must leave to it ordinary powers of the legislative branch of the Government. The section without this

last clause permits the Legislature to exercise a sound discretion on the subject of stock transactions; but this last clause is a violation of all business principle, and, in my judgment, the dictates of common sense, and is productive of more evil than the evil which is sought to be remedied. This does not prevent the fictitious sale of stock at all; it goes further. It is hardly related to that purpose, yet it prevents the ordinary business transactions of which I have spoken, and it prevents sales being made part cash and part on time. The gentleman says, deliver the property and take security. There are many instances where the best security is the property itself. A man sells a piece of land, and the purchase money is to be paid in the future. He retains the title to the lands as his security. This is an every day transaction. * * *

"No gentleman more thoroughly understands the art of presenting the worse as the better reason. He has the capacity as shown in his argument, beyond any man that I know of on the floor. It is with the greatest difficulty at times that I resist him, for he rises with that earnest, honest expression of his, and can almost make us believe that wrong is right. But he evades the question. I ask him to walk up to the mark and say if this does not interfere with the common transactions of which I speak, and that if a man who owns insurance stock, or stock of a carriage company, is not prevented from selling it payable in the future? I say that to place that in the Constitution would make us the laughing stock of the world at large, and it will be criticised and commented upon as a simple case of corporationphobia. I say to put that in the Constitution is not to be thought of." (Ibid, p. 808.)

After some further discussion, Mr. Wilson's amendment was rejected, and the section was adopted with the last clause in it.

The issue presented in the Convention is in a measure the issue presented here.

While we recognize the so-called Police Power of a State to enact laws against gambling in any form, as being contrary to the well-being and good morals of its people, we insist that contracts for the sale of stocks on margin or to be delivered at a future day, are not, necessarily gambling contracts, and that the provision in question is too broad, and goes beyond the Police Power of the State, and violates the fundamental right of the individual to contract, and interferes with his liberty and freedom in that regard.

In Mugler v. Kansas, 123 U. S., 623–661 this Court said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are

under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Quoted with approval in Minnesota v. Barber, 136 U. S., pp. 313–20.

And in Lawton v. Steele, 152 U. S., 133–37, this Court again said:

"The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

It is recited in the preamble to the Constitution of the United States that it is ordained, amongst other things, to secure the blessings of liberty and promote the general welfare; and in the Fourteenth Amendment to this Constitution it is provided, among other things, that no State shall deprive any person of liberty or property without due process of law.

Section 26, Article IV, of the Constitution of California, by itself, and also as construed and applied by the highest Court of the State, contravenes these provisions.

Every person competent to contract has the right to enter into any contract which does not contravene good morals or public policy. The right to contract is a part of the right inherent in the individual to secure a livelihood. It forms a most important part of his liberty, and is most effective in maintaining life and in promoting his own and the general welfare. No one has the power to control this right except where necessary to uphold good morals and the general welfare. It has always been recognized that gambling is detrimental to the general welfare, and laws enacted to prohibit it have, therefore, been sustained as part of the so-called police power of the State. But this police power has its limitations, and, while this Court has declined to define them, except in general terms, a consideration of the provision of the State Constitution in question must inevitably lead to the conclusion that it goes beyond it.

A margin contract is not necessarily a gambling contract, and the State of California says to all persons within its borders, you shall not enter into any contract for the sale of stocks on

margin or to be delivered at a future day, and, if you do, any money paid on such contract may be recovered by the party paying it.

This Court said, in Irwin vs. Williar, 110 U. S., p. 508:

"The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void."

This was approved in Embrey vs. Jemison, 131 U. S., 345.
See, also, White vs. Barber, 123 U. S., 419.

In Bibb vs. Allen, 149 U. S., 492, the Court said:

"It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller or to be subsequently acquired."

Tiedeman, in his exhaustive and able work on the Limitations of Police Power in the United States, says that: "The late English opinion is generally followed in the United States and it might be stated as a general American rule that *bona fide* contracts for the future delivery of goods are not invalid because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell" (Section 99, A., p. 265); and the learned author cites numerous authorities from many States in support of his statement.

The Supreme Court of California itself has recently used language which is apposite here.

The Legislature of California passed a law making it a misdemeanor for barbers to work on Sundays or other legal holidays, after 12 o'clock noon. The law was declared unconstitutional, and the Court said: "Upon the question thus presented of the proper limits of the police power much might be written, and much, indeed, will have to be written, ere just bounds are set to its exercise. But in this case neither time permits nor

necessity demands the consideration. Still it may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but, what is the logical necessity, that we are capable, to a great extent, of individual self-government. If this conviction shall prove ill-founded, we have built our house upon sand. The spirit of a system such as ours is therefore at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is 24 hours old, yet it would strike us with surprise to see the Legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we do upon the enactment of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him. So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic; for the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws none the less dangerous because well meant. We think the act under consideration gives plain evidence of such encroachment."

Ex-parte Jentzsch, 112 Cal., pp. 468–72.
See also matter of Jacobs, 98 N. Y., pp. 98–106.

The case before the Court is forcibly presented in Hatch v. Douglass, 48 Conn., pp. 127–8. There the learned Court said:

"The authorities are clear that a contract relating to stocks or other commodities, to be performed at a future day, by which the parties contemplate only the payment of the difference in the market value by one or the other, as the case may be, is a mere gaming contract and void. So if parties in form contract to sell goods to be delivered in the future, the seller in fact having no goods, and the parties not intending an actual delivery, but contemplating merely a payment of the difference between

the market value on that day and the agreed price, it is a gaming contract and cannot be enforced.

"Contracts of this nature, however, are distinguishable from speculating contracts. A man may legitimately buy goods or stocks, intending to sell in a short time and take advantage of an advance in the price if there is one. In such a case he takes the risk of a decline, but that does not make it a gambling contract. And he may purchase goods at a fixed price to be delivered at a future day, if the parties intend an actual delivery and acceptance. The actual intention may be difficult to prove or disprove; but, when once the fact is established one way or the other, there is no difficulty in applying the law.

"Now there are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery—not to the principal, but to the agents for the principal. The plaintiffs advanced the money and held the stocks in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase money. The import of the finding is, and we must so regard it, that it was an actual and *bona fide* employment of the plaintiffs to purchase stocks, and not a mere formal employment designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commissions and interest on their advancements, whether the stocks went up or down. The most that can be said of them is, that they knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral."

In Union National Bank v. Carr, 15 Fed. Rep., 438, the Court said: "There seems to be no serious question made in this case, except that of the legality of the contracts, which lie at the basis of the controversy. It is insisted that the contracts in question were illegal because they were 'option' contracts, and because the defendant was charged with certain losses, by reason of his failure to put up 'margins,' etc. The evidence, however, falls far short of what is necessary to establish illegal-

ity in contracts of this kind. All 'option' contracts are not illegal, and the incident of putting up margins amounts to nothing unless the contract itself is illegal. The validity of 'option' contracts depends upon the mutual intentions of the parties. If it be not their intention in making the contract that any property shall be delivered or paid for, but that the pretended and fictitious sale shall be settled upon differences, the agreement amounts to a mere gambling upon the fluctuations of prices, and the contract is utterly void. But if it is the *bona fide* intention of the seller to deliver or the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid.

"If the contract itself is lawful, the putting up of margins to cover losses which may accrue from the fluctuation of prices, and the final settlement of the transaction according to the usages and rules of the Board of Trade are entirely legitimate and proper.

"Nothing whatever appears in the present case to impeach the validity of the transactions in question, except that the defendant was dealing in options through his broker on the Board of Trade; that he failed to put up required margins; and that his transactions were settled at heavy losses, which were charged to him. This is entirely insufficient to invalidate the charges made in the account against him."

In Roundtree v. Smith, 108 U. S., 269–275, this Court said: "The counsel for defendant resisted recovery against him on the ground that the sales and purchases made for him by plaintiffs were gambling contracts on the prices of the various articles of produce to which they related, never designed to be actually performed by delivery, but the damages were to be adjusted and payments made and accepted, according to the difference between the contract price and the market price at the date fixed for delivery. And on this subject he asked certain instructions of the Court, which were refused. The Court also charged the jury that there was no evidence on this subject which they could consider. An exception was taken to this ruling, and a bill of exception purports to embody all the testimony.

"The evidence of the defendant on this point was that he gave the instruction to buy. He says: 'I could not say that I had any understanding on the subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for.'

"It is obvious, therefore, that so far as plaintiff, one of the parties to all these contracts, which he now impeaches, is con-

cerned, they were not gambling contracts, and that he had no understanding or agreement, expressed or implied, that they were bets upon the future price of the article.

"The other party to these contracts, or, rather parties (for the contracts were numerous) are not produced, nor their testimony given, and there is no direct evidence that any of them either bought or sold with any other purpose than to perform the agreement as its terms bound them.

"The plaintiffs, in answer to questions on this subject, say that in no instance had they any agreement with the parties to the contracts made by them for Mr. Roundtree, that performance was not expected or intended, but a mere adjustment of differences, and they say that actual delivery of the article was made in some of them. So that as to these contracts, in regard to which the services were rendered and money advanced by plaintiff for defendant, there is no evidence whatever that they were not *bona fide* contracts, enforcible between the parties, and made to be performed.

"Evidence was given that a very large proportion of all the contracts made for the sale of produce at the Board of Trade of Chicago were settled by payment of differences, and that nothing else was expected by the parties to them; and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is said to be so large as to justify the inference that it was so in these cases.

"But since the plaintiff testifies that he had no such understanding, since nothing is proved of the intention of the other parties, and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law, or to justify a jury in making such a presumption.

"It is also to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request; and though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it if proved, they are certainly not in the same position as a party sued for the enforcement of the original agreement.

"Without pursuing the subject further, we are of opinion that there was no evidence on this subject which ought to have been submitted to the jury, and the Court was right in withdrawing it from their consideration."

See also Bigelow v. Benedict, 70 N. Y., p. 20.
Story v. Salomon, 71 N. Y., p. 420.

In 1734, in the reign of George the Second, a statute was enacted in England to prevent stock-jobbing. It was called "Sir John Barnard's Act," and "was enacted for the purpose of preventing gambling in the funds, by parties who never intended to buy or sell, but merely to speculate upon the future price of stock, by making what are called 'time bargains,' and compounding for differences. It was never intended to affect the *bona fide* sale of stock, where the stock was actually transferred, although the seller was not possessed of it at the time of making the contract."

Dos Passos on Stock Brokers, etc., p. 383.

The provisions of the Act are set forth in Dewey on Contracts for Future Delivery and Commercial Wagers, page 14.

"In Chitty on Bills (11th Am. ed.), 92, note (e), a stock-jobbing contract is defined as follows: 'Neither buyer nor seller have any stock, but the buyer agrees nominally to buy of the seller stock (say £1000) on a certain day. When that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent on the £1000 as the stock has fallen, but if the stock has risen the seller pays the buyer in a similar way. The sums so paid are called differences. In fact, a time bargain is a mere wager, the seller betting that the stock will fall, the buyer that it will rise.'"

Note, Dos Passos, page 384.

"The Act did not apply where the seller was really possessed of the stocks intended to be transferred; and it was sufficient if at the time of the sale, through the medium of a Broker, the principal was possessed of the stock, although his name was not disclosed by the Broker."

Dos Passos, page 386.

All the Acts which have been passed in this country on the subject, were based upon the English law.

See Dewey, pp. 14 *et seq.;* Dos Passos, pp. 382 *et seq.*

"The general proposition upon the subject of wagers may be stated as follows: If the agreement between the parties is a *bona fide* contract to buy and sell, the law will sustain it; but where it appears from the evidence that there is no real contract of sale, and that the whole arrangement is to be settled by the payment of 'differences,' it will be set aside. This statement is conceded in all of the cases."

Dos Passos, p. 410.

"A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor and to own the fruits of his toil."

Ex parte Jentzsch, 112 Cal., p. 473.

The word "liberty," as used in the Fourteenth Amendment, has been repeatedly held by this Court not to be confined in its meaning to freedom from physical restraint or imprisonment; it has always been given a broader interpretation and includes the right of the individual to enter into such contracts as he pleases, provided always that they are not against public policy. See definition by Mr. Justice Field in Powell v. Pennslyvania, 127 U. S., 691–2.

The question at issue is not so much as to the principle involved, for there can be no divergence of opinion upon that point, but as to its application to the case at bar. We concede the existence of the so-called police power of the State, but insist that the State has no power to arbitrarily declare that a particular contract is a gambling contract when it is not, and when gambling is not an element necessarily inherent in the nature of the contract itself, and without evidence of an intention to gamble on the part of those entering into such contract.

If such a power existed, the most innocent of contracts might be forbidden on the ostensible ground of "public policy," and the individual deprived of his liberty to contract.

The provision of the State Constitution is not limited to the stock of mining corporations. It embraces corporations and associations of every kind and nature.

It interferes with the life of trade. A vast amount of the commerce of the country is conducted through the agency of corporations and associations. Their stock is owned by multitudes of persons, and represents the property thereof. Title to this stock passes by endorsement and delivery of the certificates, and dealings in these certificates represent, to a great degree, dealings in this property.

The California Constitution thus discriminates between property held by individuals in corporations which is represented by the stock of such corporations and property held by individuals directly or without the intervention of the legal entity called a corporation, and unduly restricts individuals in the mode and manner of dealing in the former.

The provision in question, failing to distinguish between *bona fide* contracts and gambling contracts, is not a police regulation, and in restricting the individual in making contracts for the sale of stock on margin or to be delivered at a future day, to

that extent deprives him of the free and beneficial use of his property without due process of law—the stock itself being a species of property and representing other property. In addition, the individual is deprived of his property without due process of law, viz, the money paid to him on such contracts. If he has an inherent right to make such a contract—that is, if it is beyond the police power of the State to prevent him from entering into such contract—it follows that the State has no right to take from him and give to another the money paid him on such contract.

Except for the provision of the State Constitution, there would be no right of recovery in the defendant in error. This right of recovery is undoubtedly in the nature of a penalty imposed by the State Constitution upon those entering into a contract which it declares shall be void. The money here in question was paid to plaintiffs in error in repayment of their advances under *bona fide* contracts which were not immoral. These contracts, the California Court, in effect, declared to be void under a constitutional provision which encroaches upon the rights guaranteed to the individual by the Fourteenth Amendment, and in violation of that Amendment defendant in error recovered a judgment against plaintiffs in error for this money.

It is respectfully submitted that this judgment must be reversed because in contravention of rights guaranteed by the National Constitution.

EDMUND TAUSZKY,
Attorney for Plaintiffs in Error.

San Francisco, California, January, 1897.

Office Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1896. No. 222.

HERMANN ZADIG ET AL.,
Plaintiffs in Error,

VS.

IDA B. BALDWIN,
Defendant in Error.

Brief on Behalf of Defendant in Error.

T. C. VAN NESS,
Attorney for Defendant in Error.

Filed this ..... *day of February, 1897.*

JAS. H. McKENNEY, Clerk.

By ..... *Deputy.*

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

HERMANN ZADIG ET AL., Plaintiffs in Error, vs. IDA B. BALDWIN, Defendant in Error.	No. 222.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The single question presented for the decision of this Court is: Has the State of California the power, by constitutional enactment, to prohibit or render void contracts such as those entered into by the parties to this litigation? If it has, the judgment should be affirmed.

The California Courts have decided that the transactions between the parties are within the prohibition of that provision of the State constitution which it is herein sought to overturn, and which renders void all contracts for the sale of shares in incorporated companies on margin. This construction of the State law, and its application to the facts of this particular case cannot be reviewed in this Court, and the only point, therefore, to be determined, as already suggested, is: Has the State the power to render void this class of contracts?

It will not be denied that the State may, by constitutional or legislative enactment, regulate, and, if need be, prohibit, all gambling or other contracts which are opposed to good morals, or which may adversely affect the well being of the commonwealth. It is unnecessary to cite authority in support of this proposition. And we confidently assert that the dealings of the plaintiffs and defendant in error, as disclosed by the record,

were of such a character as to bring them within this right of control.

It may be admitted that a transaction by which a party, through a broker, purchases property, and then pledges that property to the broker as security for a part of the purchase price advanced by the broker, is legitimate, and, speaking generally, that this mode of dealing is in no way opposed to the good morals or well being of the State. But it does not follow that, *in all cases*, such transactions are *not* opposed to good morals, or adverse to the well being of the commonwealth, and hence beyond the reach of State control. And if any particular case, or class of cases, is of this character, the power of the State to deal with them is practically unlimited. Gambling contracts, and therefore necessarily contracts promotive of gambling habits, are of this class.

It is a part of the history of this country, of which the Court will take judicial notice, that the discovery of the great Comstock lode inaugurated upon the Pacific coast, and, to some extent, throughout the United States generally, an era of speculation which has had no parallel in the present century. From the humblest artisan to those highest in social life—from the day laborer to the banker, substantially all the people of California, at least, were speculating in shares. Speculation was naturally followed by over-speculation, and buying and selling upon margin was the necessary outgrowth of the latter.

Hopeful of a fortunate result to his investment, the investor would naturally desire to purchase, for the amount invested, as large a number of shares as possible, and buying upon margin opened this door to him. Upon the shares thus purchased the banks made advances to the broker, and upon the strength of these advances the broker "*carried*" the investor. Loans of this character naturally brought high interest, with the result that the money of the banks and the money changers found its way into these speculative channels, and legitimate enterprises either could not obtain at all the funds necessary for their development, or could obtain them only at ruinously high rates of interest. Of course, the tendency of all this was to retard the commercial and industrial development of the State—to divert our people from the ways of thrift and conservatism into those of the gambler, with the usual accompaniments of suffering, defalcations, bankruptcies and suicides.

Mine owners, stock brokers and stock gamblers generally were interested in maintaining this state of affairs. It was evidently the purpose of the constitution makers to permit the continuance of stock dealing among legitimate lines, but to put

an end to a mode of buying and selling which had been promotive of excessive and unhealthy speculation.

The constitutional provision which is attacked does not prohibit the buying or selling of stocks, nor the borrowing of money upon stocks which are the property of the borrower. It merely prohibits a class of transactions which are stimulative of excessive speculation in shares, indirectly tending to the withdrawal of moneys from other and more legitimate industries, and the fostering of gambling habits necessarily destructive of that spirit of industry and economy which is the surest foundation of State prosperity. It would seem that a law which tends to check these evils, and the necessary result of which is to promote State development, is clearly within the police power of the State.

An examination of the transactions between the defendant and plaintiffs in error, as set forth in brief of plaintiffs (pp. 3–5), discloses the gambling character of their relations. Commencing with a deposit of $50 on March 3d, 1892, defendant, at various times, down to and including December 20th of the same year, put into the hands of plaintiffs in error the aggregate sum of $590. With the exception of one or two brief intervals, she was, during all this period, in debt to the plaintiffs by reason of purchases of stock upon her account in excess of the amounts which she had paid in. The deposits were made by her to enable her to trade on "margin"—to buy more than she could pay for. At no time did she control the stock bought on her account—it was at all times held by plaintiffs as security for the differences between her margin deposits and the purchase price of the stocks. The shares purchased for her account were, at all these times, mixed in with the other shares held by plaintiffs for their other customers, and could be sold or otherwise transferred by plaintiffs without her consent or knowledge. Their only obligation was to have on hand an equivalent number of shares of the same stock. The end came in the decline and forced sale of the stocks *to make good* defendant's account. This final ceremony concluded, there remained to defendant in error, of the $590 deposited with plaintiffs, the large sum of five cents. We know of no phrase which will better express the nature of these transactions between plaintiffs in error and defendant, than "gambling in stocks," and we again submit that the prohibition of this particular species of gambling is as much within the police powers of the State as that of any other kind of gambling.

It will be observed from the review of the California cases by counsel for plaintiffs in error, that the decisions in this State

proceed upon the theory that, in transactions such as those disclosed by the record, the broker, in effect, purchases the stock ordered and then, in turn, sells it to his customer, thus bringing the case within the language of the constitutional provision under review. It may be that the framers of the constitution did not have in mind this application of that language. We must, however, in view of judicial interpretation, presume that the constitutional prohibition was intended to reach and make void contracts between broker and customer such as those in this case, and to stamp them as contrary to the public policy of the State. For the reasons already suggested, this constitutional legislation is within the power of the State, and not open to the objections which have been urged against it.

The various authorities which have been cited by counsel for plaintiffs in error to the effect that contracts for future delivery, performance of which has been secured by a marginal deposit, are without application in the present case. It may be that, in the absence of prohibitory legislation, such contracts at common law will be held to be good. But in none of these cases was the question raised, as to the power of the State to prohibit the making of a class of contracts found by experience to be promotive of injury to the welfare of the State. And in this connection we finally suggest that the Federal Supreme Court should not overturn a constitutional provision of this character, unless it plainly appears that contracts prohibited cannot adversely affect the general good of the State. If the effect of these marginal dealings may be such as it was supposed to be at the time the constitutional provision was adopted, the decision of the people of the State, evidenced by their adoption of the constitution, should be permitted to stand.

It does not follow that because, under certain conditions, marginal contracts and contracts for future delivery may not be gambling contracts, the State may not therefore prohibit them. The rule, as we understand it, is, that if this form of contract may be used to cloak gambling transactions, or such manner of dealing as is or may be contrary to the welfare of the State, the latter may, by legislation, regulate, or prohibit it. This principle is certainly laid down in *Powell* vs. *Pennsylvania*, 127 U. S., 678. It was conceded by the Court, in that case; that oleomargarine might be so manufactured as to be harmless as a food, but, because it might also be so manufactured as to be hurtful to the public health, legislation of the State of Pennsylvania, prohibiting its sale, was upheld. And in its opinion in that

case this Court said: "Whether the manufacture of oleomargarine, or imitation butter of the kind described in the statute, is, or may be conducted in such a way, or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of these questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts, entering into the questions of public policy merely and to sustain, or frustrate, the legislative will embodied in the statute, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that part of the government has, in the employment of means to that end, is very large."

In re Application of Jacobs, 98 N. Y., 98 (110), it is said: "Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts."

In *Mugler* vs. *Kansas*, 123 U. S., 603, it is said that "a prohibition simply upon the use of property for purposes that are declared by valid legislation to be injuries to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain purposes, is prejudicial to the public interests. Nor can legislation of that kind come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property without due process of law."

In addition to the general objection made, it is urged that

the constitutional provision under review is open to the further criticism that it is prohibitory only of marginal dealings in corporate shares. The evident answer to this is, that it is only by reason of such dealing in this particular kind of property that the evils sought to be guarded against are likely to ensue. At the time of the adoption of the Constitution, shares in corporations were the only kind of property in which gambling upon margin was indulged in this State. The fact that similar gambling in other kinds of property might then have been, or may now be possible, does not invalidate the provision. The fact that all kinds of gambling are not prohibited by the Constitution will not render void a prohibition against a special form of gambling.

Respectfully submitted,

T. C. VAN NESS,

Attorney for Defendant in Error.

MAR 22 1897

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 222.

HERMANN ZADIG ET AL., COPARTNERS, &c., PLAINTIFFS IN ERROR,

vs.

IDA B. BALDWIN, DEFENDANT IN ERROR.

BRIEF IN REPLY ON BEHALF OF PLAINTIFFS IN ERROR.

EDMUND TAUSZKY,
Attorney for Plaintiffs in Error.

Filed this 22d day of March, 1897.

JAS. H. MCKENNEY, *Clerk,*
By
Deputy Clerk.

(No. 15,788.)

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Defendant in error asserts that the dealings between her and plaintiffs in error were of such a character as to bring them within the right of the State to control, upon the ground that they are opposed to good morals or adversely affect the well being of the Commonwealth.

This we deny. Defendant in error concedes "that a transaction by which a party, through a broker, purchases property, and then pledges that property to the broker as security for a part of the purchase price advanced by the broker, is legitimate, and that, speaking generally, this mode of dealing is in no way opposed to the good morals or well being of the State."

The dealings between the parties here were of precisely such a character, and nothing more. They did not constitute gambling contracts. There is no evidence that defendant in error made her deposits to enable her "to buy more than she could pay for." She at all times controlled her stock as much as any owner controls pledged property. She controlled her account, her purchases and sales and deposits and withdrawals, to the fullest extent, with this reservation, that, as the result of contract, plaintiffs in error had the right to sell when they deemed the security insufficient, and this was in accordance with the universal practice in such cases. It is inaccurate to say that the "shares" of defendant in error were mixed in with the "shares" of others and could be sold without her consent or knowledge. The supreme court of California has recognized the distinction between "shares" and "certificates." The *shares* of defendant in error could only be sold with her consent, as given by her contract.

Certificates representing shares were, under the law, interchangeable, and her rights were fully protected so long as plaintiffs in error had on hand a sufficient number of shares of the stock of the same company to meet her demands, whether evidenced by one certificate or another. There is no special virtue or value in a particular certificate. In purchasing, a given number of *shares* are purchased and not such and such a certificate, and it is entirely a matter of chance and of no consequence what particular certificate is delivered.

The cases cited on page 14 of our opening brief amply demonstrate and fully sustain this proposition.

Defendant in error may have speculated in stocks. She did not gamble in the sense in which the word is used in the law. But every transaction is more or less a matter of speculation. Real estate is purchased upon the speculation that it will rise in value or produce a certain income. Commercial pursuits are engaged in upon the speculation that

they will prove profitable. Merchandise is bought upon the speculation that it can be sold again at an advance. One is as legitimate as the other. Defendant in error bought stocks and sold them again. On her first transactions she made a profit. In her subsequent transactions she did not exercise the same good judgment; she held her stocks until they declined in value. Either because her confidence in her investment gave out or because she did not wish to risk a further loss, or on account of what you will, she made no further payments. She knew the extent of her loss and evidently desired it to end there; or possibly she had been advised that under a constitutional provision which allowed her to profit by her contract "as long as it pays and to repudiate it by boldly ignoring her solemn obligations as soon as it begins to show loss" she need make no further payment, but may recover back what she has already paid. Be that as it may, plaintiffs in error did not control the market value of the stock and did not produce the result that five cents remained to defendant in error when her account was closed.

The discovery of the precious metals on the Comstock lode and in California gave to California and Nevada the greater part of their early population and made California one of the wealthiest States in the Union. It owes much to its mineral resources and to those of Nevada, and the condition of Nevada today shows the result of the practical exhaustion of the great mineral deposits on the Comstock lode.

The fortunes of the successful miners were largely invested in the soil and industries of California, and helped to build it up. The development of these mines enabled these States to supply the Government with the metals for the money of the nation. Instead of retarding the commercial and industrial development of California, it advanced it. It enabled the State and its metropolis to become what they are. It made them known to the world. It brought life and activity into them, and in the wake of

the discovery of gold came industrial and commercial development. The resources of the great State becoming known, thousands were attracted to it who otherwise would have remained in their distant and more comfortable homes, and it is a slander upon the people of a great State to say that they became gamblers, defaulters, bankrupts, and suicides.

The history of California presents no such deplorable and disgraceful spectacle.

We venture to assert that in no case was a person desiring to borrow money from a bank for the development of "legitimate enterprises" refused a loan or charged "ruinously high rates of interest" because the money of the bank had found its way into "speculative channels." By reason of the inherent uncertainty in value of undeveloped or partially developed mining property, mining stocks naturally fluctuated in their market price, and that by reason of such fluctuation speculation was increased need not be denied; nor need it be disputed that because of such fluctuation loans upon mining stocks, involving a greater risk than upon more stable property, brought high rates of interest; but the mere fact that stock was purchased on margin did not bring this about. It was the loan upon property of a fluctuating value that caused it, and this would be so whether the property consisted of mining stock or gas or water stock.

It is a matter of which the Court will take judicial notice that there was an uprising of the lawless elements of the community against the established order of things. Unfortunately, by false hopes and promises they lured the poor laboring man—the first to be deceived and to suffer in consequence—into their camp, and the Kearney riots remain as a black spot in the history of San Francisco.

The constitutional convention of 1878 and the adoption of the present constitution of California in 1879, by a narrow majority of the voters of the State, were the results of the communistic agitation of the time, and, as might be ex-

pected, the constitution contained many provisions destructive of the rights of individuals and of property, and this is not the first time that this Court has been called upon to place the seal of its condemnation upon them. The provision here in question was one of these, and Mr. S. M. Wilson, a sober-minded member of the constitutional convention, rightly predicted that it would make us the laughing stock of the world at large. This provision was one of those born of the desire to regulate the affairs of men for them; to treat them as children and exercise a parental supervision over them, and to enable men to evade the consequences of acts entered into by them with their eyes open. Such, we submit, is not the theory or purpose of our Government.

The utmost freedom for the individual, consistent with the rights of others, is the basic principle of our governmental fabric, and this provision encroaches most seriously upon it. Instead of promoting good morals, it has, we submit, a direct tendency in the opposite direction. It does not put an end to speculation, but tempts the dishonest to speculate upon the risk of others and to repudiate his contract if there is a loss.

The provision in question does not profess to regulate the affairs of corporations. It is not in the article on corporations. It aims at margin contracts. These contracts are practically forbidden to individuals. It does not command or forbid corporations to do or not to do a particular thing. It does not make the transfer of corporate stock between individuals in a certain manner a condition of the creation or continued existence of the corporation or of the issuance of stock. It imposes no duty or penalty upon the corporation. Shares of stock are a species of property, and it provides that contracts for the sale of such property on margin shall be void. The contract referred to is not the contract of the corporation, but of the individual vendor and vendee of the stock. It has nothing to do with the con-

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duct of the business of the corporation as such. It affects only an owner and a prospective purchaser of stock. It does not say to the corporation that it shall only issue stock to be sold for cash. After stock is once issued the corporation loses entire control of it and cannot regulate the methods of transfer as between individuals. The provision, therefore, relates to the dealing in shares between individuals and in no manner affects the corporate existence. It is true that a corporation derives its life and power from the State; that it is an artificial being or legal entity, subject to the regulation of the State, but this provision does not purport to be a corporate regulation or to impose a condition or limitation upon corporate action, but merely purports to deal with a certain class of contracts in a certain species of property.

The learned counsel for defendant in error says that buying or selling stocks or borrowing money upon stocks which are the property of the borrower is not prohibited, but that buying on margin is stimulative of excessive speculation and the fostering of gambling habits, and therefore within the police power of the State.

The constitutional provision here assailed does prohibit the buying or selling of stocks on margin or to be delivered at a future day. In other words, it permits only the purchase or sale of stocks for cash, accompanied by an immediate delivery.

It does therefore prohibit the buying and selling of stocks except in a certain manner, and we submit that the State has no power to dictate to the individual how or upon what terms he shall buy or sell. Nor do we perceive how the purchase of stock on margin is any more stimulative of excessive speculation than the borrowing of money upon stocks which are the property of the borrower.

Respectfully submitted.

EDMUND TAUSZKY,
Attorney for Plaintiffs in Error.